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The Resurgence of Durational Residence Requirements for the Receipt of Welfare Funds

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THE RESURGENCE OF DURATIONAL RESIDENCE REQUIREMENTS FOR THE RECEIPT OF WELFARE FUNDS¹

TABLE OF CONTENTS

I. INTRODUCTION	306
II. THE HISTORY OF THE RIGHT TO TRAVEL	310
A. <i>The Early Right to Travel</i>	310
B. <i>Shapiro v. Thompson and Durational Residence Requirements</i>	312
C. <i>The Right to Travel After Shapiro v. Thompson</i>	315
1. <i>Dandridge v. Williams</i>	315
2. <i>Dunn v. Blumstein</i>	315
3. <i>Memorial Hospital v. Maricopa County</i>	316
4. <i>Sosna v. Iowa</i>	319
5. <i>Zobel v. Williams</i>	322
6. <i>Attorney General v. Soto-Lopez</i>	324
III. MOTIVES UNDERLYING ENACTMENT OF DURATIONAL RESIDENCE REQUIREMENTS	327
A. <i>The Welfare Magnet Theory</i>	327
B. <i>Discrimination Against Indigent New Residents</i>	332
C. <i>Public Dissatisfaction with the Welfare System</i>	333
IV. ANALYSIS	335
A. <i>Types</i>	335
1. Type I	335
2. Type II	336
3. Type III	336
4. Type IV	336
B. <i>Strict Scrutiny Analysis</i>	337
1. Type I	337
2. Type II	339
3. Type III	344
4. Type IV	347
C. <i>Rational Basis Analysis</i>	349

1. This Comment does not address the wisdom or lack thereof of a welfare system. It simply addresses the way a welfare program, once adopted, may be regulated. Also, this Comment is limited in scope to durational residence requirements for receipt of welfare aid and does not address such requirements as they apply to education, voting, aliens or noncitizens, or other areas.

1. Type I.....	350
2. Type II.....	350
3. Type III.....	351
4. Type IV.....	353
V. CONCLUSION.....	353

I. INTRODUCTION

In 1969 the United States Supreme Court decided the landmark case *Shapiro v. Thompson*.² In *Shapiro*, the Court addressed the constitutionality of the statutes of several states that denied all welfare assistance to residents who had not lived in the state for one year.³ Such statutes are known as "durational residence requirements."⁴

Durational residence requirements impose a waiting period on new residents prior to their receipt of some benefit or entitlement—in this case, welfare aid.⁵ However, these waiting periods are not tests of bona fide residency—that is, whether an individual is or is not a resident of the state.⁶ Instead, durational residence requirements are imposed on indi-

2. 394 U.S. 618 (1969).

3. *Id.* at 622. For a discussion of the Court's analysis in *Shapiro*, see *infra* part II.B.

4. This Comment uses the terms "waiting period" and "durational residence requirement" interchangeably.

5. Nationally, welfare aid consists primarily of the federally backed Aid to Families with Dependent Children (AFDC), created by the Social Security Act of 1964, 42 U.S.C. §§ 601-609 (amended 1968), and Aid to the Permanently and Totally Disabled, *id.* §§ 1351-1355 (1950) (amended 1981). Rounding out the federal program is Aid to the Blind, *id.* §§ 1201-1206 (1935) (amended 1981), and Old Age Assistance, *id.* §§ 301-306 (1935) (amended 1981). Of these four programs, AFDC is by far the dominant category. Indigents may also be eligible for state general assistance, which every state maintains. Indigent individuals are also eligible for other programs such as food stamps, medical assistance, vocational rehabilitation, and housing assistance. This Comment uses the terms "welfare," "welfare funds," and "welfare aid" interchangeably to mean any of the above programs, and does not distinguish between them. However, AFDC and state general assistance are the primary sources of welfare aid to indigents that are denied by durational residence requirements.

Note, however, that the term "welfare" as used in this Comment does not include "social security" payments, which, unlike welfare, are based on past contributions.

6. The Court has noted:

We have always carefully distinguished between bona fide residence requirements, which seek to differentiate between residents and nonresidents, and residence requirements, such as durational, fixed date, and fixed point residence requirements, which treat established residents differently based on the time they migrated into the State. . . . "A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement [generally] does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents."

viduals who by definition already are residents of the state.⁷ Thus, durational residence requirements serve to group bona fide state residents into two categories: those who have been residents for the specified period of time and those who have not.

The Court in *Shapiro* used the Equal Protection Clause of the Fourteenth Amendment⁸ to strike down these types of statutes.⁹ The Court held that durational residence requirements impermissibly burden the right to travel,¹⁰ which—though not explicitly mentioned in the Constitution—has been found to be a fundamental right.¹¹

Following the *Shapiro* decision in 1969, state residence requirements for receipt of welfare aid soon disappeared—either being quickly struck down by the courts, or by falling into nonenforcement. For some twenty years following *Shapiro*, the issue of durational residence requirements—at least as applied to welfare aid—seemed settled.¹² Today, however, the specter of residence requirements for welfare aid has resurfaced. Some states have revived old residence requirements for welfare aid¹³ or have enacted, or are attempting to enact, new ones.¹⁴ These statutes are often in bold defiance of *Shapiro*,¹⁵ having been enacted with the express intention of deterring interstate migration of indigent individuals in order to prevent the state from becoming a “welfare magnet.”¹⁶

In a 1989 case Judge Tinder of the United States District Court for the Southern District of Indiana addressed the first court challenge to this resurgence of state durational residence requirements for receipt of

Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 903 n.3 (1986) (quoting *Martinez v. Bynum*, 461 U.S. 321, 328-29 (1983)).

7. *Id.*

8. The Equal Protection Clause states: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

9. *Shapiro*, 394 U.S. at 633; see *infra* part II.B.

10. *Shapiro*, 394 U.S. at 633; see *infra* part II.B. This Comment, though truly focused on the right to migrate, bows to conventional terminology and continues to use the more imprecise “right to travel” interchangeably with “right to migrate.” The long history of the doctrine makes a change at this point beyond this Author’s ability to correct.

11. See *infra* notes 41-43 and accompanying text.

12. Durational residence requirements continued in other areas. See *infra* part II.C.

13. See *infra* note 223.

14. See Michael Wiseman, *Welfare Reform in the States: The Bush Legacy*, FOCUS (U. Wis., Madison), Spring 1993, at 18, 23-25. These states include Illinois and Wyoming, as well as California, Wisconsin, Minnesota, and Indiana. *Id.* at 23-24; see *infra* part IV.B.

15. For example, California Governor Pete Wilson has stated that he feels *Shapiro* and its progeny are wrongly decided. Daniel M. Weintraub, *Wilson Favors Wait for Welfare*, L.A. TIMES, Nov. 10, 1991, at A3. He supported the enactment of California’s current durational residence requirement. *Id.* The California statute, however, has since been declared unconstitutional. See *infra* notes 258-74 and accompanying text.

16. See *infra* part III.A for an analysis of this theory.

welfare aid in his memorandum opinion in *Eddleman v. Center Township*.¹⁷ The court in *Eddleman* applied the "old and well-established" rule laid down in *Shapiro*¹⁸ and held unconstitutional an Indiana durational residence requirement that required three years of continuous state residence and one year of continued county residence prior to receipt of aid.¹⁹ In *Eddleman*, both parties agreed that "strict scrutiny" applied.²⁰ Though with this agreement the case could have been disposed of by consent decree,²¹ Judge Tinder felt that his memorandum would prevent future constitutional violations and obviate "the need for attorneys and the federal bench to revisit an area of law that is by now well-travelled."²²

Unfortunately, Judge Tinder's memorandum opinion only serves to highlight the fact that this area, though well-travelled, is far from well-settled.²³ Attorneys and the federal bench have revisited and will continue to revisit this area of the law.²⁴ In fact, *Eddleman* highlights the very core of the problem: When does a durational residence requirement for welfare penalize the right to travel and thus trigger strict scrutiny, and when does it not?²⁵

This ambiguity is the target of the new state residence requirements. States trying today to enact durational residence requirements have attempted to distinguish their new laws by making them "less onerous" than the statutes at issue in *Shapiro*—hoping to thereby avoid strict scru-

17. 723 F. Supp. 85 (S.D. Ind. 1989).

18. *Id.* at 87.

19. *Id.* at 89 n.8; see *infra* notes 215-23 and accompanying text.

20. *Eddleman*, 723 F. Supp. at 87; see *infra* note 220 and accompanying text.

21. *Eddleman*, 723 F. Supp. at 87.

22. *Id.*

23. In fairness to Judge Tinder, the *Eddleman* case was so factually similar to *Shapiro* that *stare decisis* demanded that strict scrutiny apply and that the statute fail. When a statute is so factually similar to *Shapiro*, that result is well-settled. However, the issue of when durational residence requirements that differ factually from those at issue in *Shapiro* is anything but well-settled.

24. Since *Eddleman*, three other cases have considered the right to travel. *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993); *Mitchell v. Steffen*, 487 N.W.2d 896 (Minn. Ct. App. 1992); *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992); see *infra* part IV.B.

25. Judge Scirica very recently made a similar observation in *Schumacher v. Nix*, 965 F.2d 1262 (3d Cir. 1992), where the right to travel was implicated, but no issue of residence requirement was involved. Judge Scirica noted: "The Supreme Court has yet to articulate why it has applied rational basis review in some right to travel cases and strict scrutiny in others, except to say that where a law cannot meet the minimum rationality requirement there is no need to undertake a more searching inquiry." *Id.* at 1267.

tiny review.²⁶ Thus, the states are attempting to walk the line of strict scrutiny.

This gamesmanship has led to diverse judicial results. Including *Eddleman*, four cases since 1989 have addressed these new durational residence requirements.²⁷ In three of the four cases, the statutes at issue have been found unconstitutional under a strict scrutiny standard.²⁸ In one case, *Jones v. Milwaukee County*,²⁹ the court applied rational basis review and found the challenged statute constitutional.³⁰ However, in none of these cases did a court lay out logical parameters for determining when strict scrutiny is triggered and when it is not.³¹

This Comment attempts to define when durational residence requirements for welfare aid penalize the right to travel, and how well those requirements will fare under both strict scrutiny and rational basis review. Part II reviews the right to travel, because its lengthy and convoluted history has only compounded the problem of defining the parameters of strict scrutiny in these cases.³² Part III addresses some of the assumptions and problems inherent to welfare, which complicate any analysis of the new durational residence requirement statutes, including the idea of the state as a "welfare magnet."³³ Part IV categorizes the various new state statutes³⁴ to determine if any or all of these statutes should trigger and could survive strict scrutiny,³⁵ or, in the event strict scrutiny is avoided, to consider whether the statutes could survive even rational basis review.³⁶ Finally, part V concludes that, despite the states' attempts to distinguish their durational residence requirements from those at issue in *Shapiro*, the statutes are unconstitutional under either strict scrutiny or rational basis review.³⁷

26. See, e.g., James N. Baker et al., *Welfare Migrants: A Cold Shoulder in Wisconsin*, NEWSWEEK, Aug. 14, 1989, at 23 (Wisconsin governor believes since benefits reduced, not denied, new statute can circumvent *Shapiro*).

27. See *supra* note 24; *infra* part IV.B.

28. *Green*, 811 F. Supp. at 521; *Eddleman*, 723 F. Supp. at 89-91; *Mitchell*, 487 N.W.2d at 903-04; see *infra* part IV.B.

29. 485 N.W.2d 21 (Wis. 1992); see *infra* part IV.B.2.

30. *Jones*, 485 N.W.2d at 25-26.

31. See *infra* part IV.B.

32. See *infra* part II.

33. See *infra* part III.

34. See *infra* part IV.A.

35. See *infra* part IV.B.

36. See *infra* part IV.C.

37. See *infra* part V.

II. THE HISTORY OF THE RIGHT TO TRAVEL

A. *The Early Right to Travel*

The ability to travel freely has been one of the formative and defining elements of the American experience.³⁸ Even prior to recognition of the right as fundamental in the United States, the right to travel had a long history.³⁹ Though mentioned in the Articles of Confederation,⁴⁰ the Constitution does not explicitly mention the right to travel.⁴¹ Neverthe-

38. See FREDERICK J. TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1920).

39. The Magna Carta mentioned the guarantee of free passage "into and out of the realm." MAGNA CARTA ch. 42 (1215). William Blackstone's *Commentaries* also proclaimed a right to travel, including in his list of rights "the power of loco-motion, of changing situation, of moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 WILLIAM BLACKSTONE, *COMMENTARIES* *134.

40. The Articles of Confederation provide that "[t]he people of each state shall have free ingress and regress to and from any other state." ARTICLES OF CONFEDERATION art. IV, para. 1 (1781). See *infra* part III.B for the historical nexus between the right to travel and indigent individuals.

41. Article IV of the Constitution, which is generally believed to incorporate article IV of the Articles of Confederation, see ZECHARIAH CHAFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 185-86 (1st ed. 1956), does not specifically mention a right to travel. *Id.* at 162. Rather, it guarantees in general terms the "privileges and immunities" of citizenship in the various states. Article IV of the Constitution states simply: "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

The omission of specific mention of the right to "free ingress and regress" presents two potential interpretations: First, that travel was no longer an important constitutional principle, or, second, that the right to travel was so basic a building block to the stronger union forged by the Constitution that its inclusion was superfluous. CHAFEE, *supra*, at 185. "Here, of course, the first interpretation is impossible. . . . So only the second interpretation is tenable. The reason for not expressly giving 'free ingress and regress' across state lines must be that it is in the Constitution, somewhere else." *Id.* The Supreme Court later specifically adopted this interpretation. *United States v. Guest*, 383 U.S. 745, 757-58 (1966).

The failure of the Constitution to mention the right to travel has been the main problem scholars and courts have had in identifying the source of the right. See, e.g., Raoul Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 OHIO ST. L.J. 853, 855, 876-77 (1981) (Court, in employing sourceless rights, simply supplanting morality of the people with its own). However, the sourceless right to travel has become an accepted doctrine. See *infra* part II.C.

less, regardless of source,⁴² the Court has long recognized the right to travel as a fundamental right.⁴³

42. Prior to *Shapiro*, see *infra* part II.B, the right to travel was located in many sources, for example: the Privileges and Immunities Clause of Article IV, *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 920 (1986) (O'Connor, J., dissenting); *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., concurring); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867); *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting); *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230), the Commerce Clause, *Edwards v. California*, 314 U.S. 160, 173-74 (1941); *Crandall*, 73 U.S. (6 Wall.) at 49 (Clifford, J., concurring), the Dormant Commerce Clause, *Crandall*, 73 U.S. (6 Wall.) at 49 (Chase, C.J., and Clifford, J., concurring), the Privileges and Immunities Clause of the Fourteenth Amendment, *Edwards*, 314 U.S. at 177-79 (Douglas, J., concurring), the Due Process Clause of the Fifth Amendment, *Shapiro*, 394 U.S. at 631; *Kent v. Dulles*, 357 U.S. 116, 125 (1958), the penumbra of the First Amendment, *Zemel v. Rusk*, 381 U.S. 1, 24 (1965) (Douglas, J., dissenting), inferred from the structure of the federal union, *Zobel*, 457 U.S. at 67 (Brennan, J., concurring); *Shapiro*, 394 U.S. at 618; *Guest*, 383 U.S. at 757-58, or even in no particular constitutional source, *Shapiro*, 394 U.S. at 630.

Prior to *Edwards*, which was decided in 1941, the right to travel had become a "token" right of national citizenship, along with the right to use ports, have access to the federal courts, and petition the government for grievances, which justices could point to in order to demonstrate that some rights did exist under the Privileges and Immunities Clause of the Fourteenth Amendment while they denied other rights the protection of that clause. See *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (finding right to travel is right of national citizenship, but privilege against self-incrimination is not); *Williams v. Fears*, 179 U.S. 270, 274 (1900) (holding "right of locomotion" is right of national citizenship, but tax on persons recruiting laborers for out-of-state jobs burdened right only "incidentally and remotely").

Because the right to travel was simply one of the few "window-dressing" rights held protected by the Fourteenth Amendment, there was no pressing judicial need to locate a source for the right. See Stewart Baker, Comment, *A Strict Scrutiny of the Right to Travel*, 22 UCLA L. REV. 1129, 1131 n.14 (1975); Andrew C. Porter, Comment, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 Nw. U. L. REV. 820, 823 n.24 (1992).

However, 75 years after *Crandall*, the right to travel was taken from the showcase window, dusted off, and again used as a substantive right in *Edwards*, thus ushering in the "modern" era of right to travel analysis—distinguished from the early right to travel era not only by the passing of some 75 years, but also by the transportation of the source of the right to travel from the Privileges and Immunities Clause of Article IV or the Commerce Clause into either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

43. *Soto-Lopez*, 476 U.S. at 901-02; *Zobel*, 457 U.S. at 60 n.6; *Jones v. Helms*, 452 U.S. 412, 418-19 & nn.12-13 (1981); *Sosna v. Iowa*, 419 U.S. 393, 418-19 (1975) (Marshall, J., dissenting); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Shapiro*, 394 U.S. at 629-31, 634; *Guest*, 383 U.S. at 758; *Zemel*, 381 U.S. at 23-24 (Douglas, J., dissenting); *Kent*, 357 U.S. at 126; *Edwards*, 314 U.S. at 177-78 (Douglas, J., concurring); *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868); *Crandall*, 73 U.S. (6 Wall.) at 43-44; *The Passenger Cases*, 48 U.S. (7 How.) at 492 (Taney, C.J., dissenting); *Corfield*, 6 F. Cas. at 552; see also Baker, *supra* note 42, at 1142 nn.71-72 (the right is well established; it has been recognized by judiciary for over 150 years).

B. *Shapiro v. Thompson and Durational Residence Requirements*

In *Shapiro v. Thompson*,⁴⁴ the Court affirmed lower court rulings that the one-year residence requirements for receipt of public assistance funds of Connecticut, Pennsylvania, and the District of Columbia were unconstitutional, violating the Fourteenth and Fifth Amendments.⁴⁵ Justice William Brennan, writing for the majority, grounded the right to travel analysis in the Equal Protection Clause.⁴⁶ Justice Brennan applied strict scrutiny,⁴⁷ reasoning that the waiting periods discriminated against those who had recently exercised their right to travel.⁴⁸

The Court's opinion gave no specific indication as to why the statutes in question triggered strict scrutiny review, other than that the classification of needy persons on the basis of length of residence constituted an "invidious discrimination."⁴⁹ The Court found that the asserted state interests were either constitutionally impermissible, or not compelling,

44. 394 U.S. 618 (1969). This decision spawned a good deal of commentary; however, most of it has been outdated by court decisions in the mid- to late seventies. Others are not relevant to this Comment because they trace the right to travel as it relates to voting or other matters. Some works, however, have for various reasons survived rather well. See Baker, *supra* note 42; see also Note, Shapiro v. Thompson: *Travel, Welfare and the Constitution*, 44 N.Y.U. L. REV. 989 (1969); Robert B. Thompson, Comment, *The Right to Travel—Its Protection and Application Under the Constitution*, 40 UMKC L. REV. 66 (1972). Interestingly, one commentator prior to the final *Shapiro* decision actually anticipated some of the possible variations of durational residence requirements that states are using today. See Bernard E. Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 CAL. L. REV. 567, 619-27 (1966).

45. *Shapiro*, 394 U.S. at 638, 641-42.

46. *Id.* at 633. However, the Court noted no need to "ascribe the source of this right to travel interstate to a particular constitutional provision." *Id.* at 630.

47. *Id.* at 634. Strict scrutiny analysis requires that the statute in question meet a "compelling state interest," *id.* at 634, 638, and that it be the least discriminatory means of achieving that interest, see LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6, at 1451-54 (2d ed. 1988).

48. *Shapiro*, 394 U.S. at 633. The Court stated that "a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally." *Id.* at 631.

49. *Id.* at 627. An "invidious discrimination" can arise either by statutory employment of a "suspect class" or by abridgement of a "fundamental right." See TRIBE, *supra* note 47, § 16-6. In *Shapiro*, the Court was unclear as to whether it was indigency as a suspect class or the right to travel as a fundamental right, or both, that established the "invidious discrimination" and led to strict scrutiny.

Some early commentators felt—and certainly several of the justices in the *Shapiro* majority would have agreed—that *Shapiro* established indigency as a suspect classification. See, e.g., Patrick J. Kearney, *Constitutional Law—Right to Travel*, 8 DUQ. L. REV. 170, 179-80 (1969-70); Margaret K. Rosenheim, *Shapiro v. Thompson: "The Beggars Are Coming to Town"*, 1969 SUP. CT. REV. 303, 331-32. However, the Court quickly rejected that interpretation in *Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (applying rational basis review to law

and thus the statutes failed strict scrutiny.⁵⁰ The states' primary justification was that of inhibiting migration into the jurisdiction as a means of preserving the fiscal integrity of the states' assistance programs.⁵¹ The Court specifically held that deterring indigents from migrating to the state was not a constitutionally permissible state objective.⁵² The Court also found any attempt to apportion state funds based on length of residence to be constitutionally impermissible.⁵³

After focusing on the intent to discourage travel by indigents, the Court shifted its analysis to the statutes' effects, stating that: "[A]ny classification which *serves to penalize* the exercise of the [right to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."⁵⁴ While this formulation seems to invalidate almost all durational residence requirements, the Court included language in a problematic footnote, which appears to impose a limit on its rationale:

limiting welfare payments to large indigent families). See *infra* part II.C for the modifications and clarifications to the *Shapiro* decision.

Justice Stewart's concurrence in *Shapiro* was devoted to the right to travel; however, his opinion did not settle when that right invoked strict scrutiny. He referred to a "virtually unconditional personal" right to travel, and stated that strict scrutiny was triggered by any law that "clearly impinges" on that right. *Shapiro*, 394 U.S. at 643-44 (Stewart, J., concurring). Interestingly, the Court would later rely on this vague language to expand strict scrutiny review. See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *infra* part IV.C.3.

50. *Shapiro*, 394 U.S. at 627-38.

51. *Id.* at 627-33. The Court did "recognize that a State has a valid interest in preserving the fiscal integrity of its programs But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Id.* at 633.

52. *Id.* at 631. The Court noted that "if a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.'" *Id.* (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968)).

Interestingly, the Connecticut residence requirement, which was held unconstitutional, barred assistance only to those who were eligible for welfare at the time they came into the State. *Id.* at 622 (referring to CONN. GEN. STAT. § 17-2d (Supp. 1965)). It did not operate against persons who, though subsequently needy, entered the state with a bona fide job, or who were at the time self-supporting. *Id.* That these provisions fell along with the strict one-year residence requirements of Pennsylvania and the District of Columbia suggests that state rules penalizing those who enter the state for the purpose of benefitting from the higher welfare standards are likewise unconstitutional inasmuch as they place an equal burden on the right to travel. See Christopher N. May, *Supreme Court Holds Residency Test Unconstitutional*, CLEARINGHOUSE REV., May 1969, at 1.

53. *Shapiro*, 394 U.S. at 632-33. The Court reasoned that this would "logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection The Equal Protection Clause prohibits such an apportionment of state services." *Id.* This reasoning has bothered some Justices, who have found no reason why apportionment of services based on past contribution should in all cases offend equal protection. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 72-73 (O'Connor, J., concurring); *id.* at 82-84 (Rehnquist, J., dissenting).

54. *Shapiro*, 394 U.S. at 634.

We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.⁵⁵

Thus, the Court in *Shapiro* set up a type of penalty analysis to examine restrictions on the right to travel, seemingly requiring a finding of both a penalty and a deterrence to interstate travel.⁵⁶

Shapiro has proven to be a milestone in right to travel analysis for several reasons. It was the first case to declare the Equal Protection Clause the proper framework of the right to travel analysis,⁵⁷ the first case to apply strict scrutiny to protect that right,⁵⁸ and the first case to declare that neither state nor federal governments could abridge the right to travel—even indirectly.⁵⁹ By striking down an indirect burden on the right to travel, the right was given new importance and a potentially broader scope, because welfare was not the only governmental benefit subject to waiting periods.⁶⁰

However, *Shapiro* left the precise contours of the right undefined.⁶¹ Though the case set up the two-pronged test of penalty and deterrence, the test itself was vague. There seemed to be a possibility for overly broad application of strict scrutiny, which troubled some scholars and members of the Court.⁶² Further, though the right was placed within the Fourteenth Amendment Equal Protection Clause, the *Shapiro* decision

55. *Id.* at 638 n.21. However, the vagueness of the *Shapiro* decision, and this footnote in particular, have caused quite a controversy in its subsequent interpretation. See *infra* notes 225-27 and accompanying text.

The Court later dealt with residency requirements for some of the other purposes mentioned above. See, e.g., *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898 (1986) (invalidating "fixed point" residency requirement for civil service preferences); *Sosna v. Iowa*, 419 U.S. 393 (1974) (holding constitutional one-year waiting period to receive divorce); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating state residency requirements for voting).

56. *Shapiro*, 394 U.S. at 631. However, this did not last long: The apparent requirement of actual deterrence was quickly eliminated. See *infra* note 68 and accompanying text.

57. *Shapiro*, 394 U.S. at 633.

58. *Id.* at 634.

59. *Id.* at 644. In invalidating the District of Columbia statute, the Court used the Fifth Amendment Due Process Clause, which is applicable to congressional action. Compare *id.* with *Kent v. Dulles*, 357 U.S. 116 (1958) (holding that federal government cannot abridge right to travel *abroad*).

60. See *supra* note 55 and accompanying text.

61. *Baker*, *supra* note 42, at 1137.

62. *Shapiro*, 394 U.S. at 661 (Harlan, J., dissenting); see also *Rosenheim*, *supra* note 49, at 331-34 (finding great potential for redistribution of resources by judicial indirection).

hardly stated that the Equal Protection Clause was the sole and definitive source of the right.⁶³ Most problematic, however, was the Court's failure to advance a clear test to delineate the circumstances under which rational basis review or strict scrutiny review is appropriate. It was not long, however, before the Court began to address these inadequacies in an attempt to sharpen the boundaries of the *Shapiro* analysis.

C. *The Right to Travel After Shapiro v. Thompson*

1. *Dandridge v. Williams*

In the several years following *Shapiro v. Thompson*, the Court clarified and extended the right to travel analysis introduced in *Shapiro*. In *Dandridge v. Williams*⁶⁴ the Court put to rest any speculation that indigency itself was a suspect class or that all denial of welfare benefits impinge a fundamental right,⁶⁵ holding that disparity in state aid programs was subject to the rational basis test.⁶⁶

2. *Dunn v. Blumstein*

Dunn v. Blumstein,⁶⁷ decided in 1972, was the first case following *Shapiro* in which the Court attempted to clear up some of the confusion caused by the penalty analysis. In *Dunn*, the Court expressly stated what it had only implied in *Shapiro*: It is unnecessary to actually deter travel to trigger strict scrutiny.⁶⁸ *Dunn* involved the denial of the right to vote

63. See *supra* note 46 and accompanying text.

64. 397 U.S. 471 (1970).

65. *Id.* at 484 & n.16. The Court distinguished *Shapiro* by stating that the Court in *Shapiro* found "state interference with the constitutionally protected freedom of interstate travel." *Id.* at 484 n.16. In *Dandridge*, the Court noted that "here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families." *Id.* at 484.

66. *Id.* at 485.

67. 405 U.S. 330 (1972).

68. The Court held that:

Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have any other "right to travel" cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel]."

Id. at 339-40.

Interestingly, it is the language of Justice Stewart's concurrence in *Shapiro* that the *Dunn* Court relied on in order to buttress its assertion that penalty analysis is the proper approach for right to travel cases. Justice Stewart described the right to travel as an "unconditional personal right" the exercise of which may not be conditioned. *Shapiro*, 394 U.S. at 643 (Stewart, J., concurring).

to new residents.⁶⁹ In defense of its durational residence requirement, Tennessee attempted to distinguish *Shapiro* by urging that "the vice of the welfare statute in *Shapiro* . . . was its objective to deter interstate travel,"⁷⁰ and that the Tennessee statute neither deterred nor attempted to deter interstate travel.⁷¹ However, the Court stated that this is "a fundamental misunderstanding of the law."⁷² Thus, the Court indirectly in *Dunn* held that legislative intent, even where innocent of any intent to deter migration, is irrelevant.⁷³ It is the penalty—actual or potential—on those who have exercised their rights that triggers strict scrutiny.⁷⁴

3. *Memorial Hospital v. Maricopa County*

The Court's decision in *Memorial Hospital v. Maricopa County*,⁷⁵ decided in 1974, further clarified the *Shapiro* test. In *Memorial Hospital*, the Court invalidated an Arizona statute requiring one-year residence in-county as a condition to receiving nonemergency medical care at the county's expense.⁷⁶ The Court began by making an important distinction—one that had troubled the courts for some time. The Court stated that "[t]he right to travel was involved in only a limited sense in *Shapiro*. The Court was there concerned with the right to migrate, 'with intent to settle and abide' or, as the Court put it, 'to resettle, find a new job and start a new life.'"⁷⁷ This distinction is crucial. It is not simply the right to travel state to state that is protected, but the right to migrate—to

69. *Dunn*, 405 U.S. at 331.

70. *Id.* at 339.

71. *Id.*

72. *Id.* at 339 & n.8.

73. *See id.* at 339-42.

74. *Id.* at 340. Also, the Court stated that "[t]ravel is permitted, but only at a price: voting is prohibited. The right to travel is merely penalized, while the right to vote is absolutely denied. But these differences are irrelevant for present purposes." *Id.* at 341. The Court stated that the penalty need not be total denial of the right in order to trigger strict scrutiny. *See id.* at 340-41.

However, *Dunn* differs from *Shapiro* in a significant way. In *Shapiro*, the individual was forced to choose between the right to travel, a fundamental right, and the welfare entitlement, which *Dandridge v. Williams*, 397 U.S. 471 (1970), found not fundamental. In *Dunn*, the Court considered the state-imposed choice between two fundamental rights, the right to travel and the right to vote: "In the present case, such laws force a person who wishes to travel and change residence to choose between travel and the basic right to vote. . . . Absent a compelling state interest, a State may not burden the right to travel in this way." *Dunn*, 405 U.S. at 342.

75. 415 U.S. 250 (1974).

76. *See id.* at 269-70. In keeping with the traditional nexus between indigency and the right to travel, this case was brought by an indigent new resident who was afflicted with chronic asthma and bronchial illness and who suffered a severe respiratory attack within a month after moving into the state. *Id.* at 251. For more on the nexus between indigence and the right to travel, see *infra* part III.B.

77. *Memorial Hosp.*, 415 U.S. at 255 (quoting *Shapiro*, 394 U.S. at 629).

change one's domicile. As the Court noted, "even a bona fide residence requirement would burden the right to travel if travel meant merely movement."⁷⁸

More importantly, the Court in *Memorial Hospital* continued both the penalty analysis and the "necessities of life" argument begun in *Shapiro*. The Court noted that "[i]n *Shapiro*, the Court found denial of the basic 'necessities of life' to be a penalty,"⁷⁹ and then held that "[w]hatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance."⁸⁰ Thus, in *Memorial Hospital* the Court answered an important question left vague in *Shapiro*: Though there is no fundamental right to the "basic necessities of life," as some feared might be the implication of *Shapiro*,⁸¹ the denial of those important benefits very likely "serves to penalize" the right to travel, thus triggering strict scrutiny.⁸² *Memorial Hospital*, therefore, marks the beginning of the Court's focus on the "severity of the deprivation" as the proper measuring stick in determining whether the right to travel has been penalized.

However, though *Memorial Hospital* made significant strides in clarifying the *Shapiro* doctrine, it also reintroduced one of the old problems. In reaching its decision, the Court quoted the biblical commandment that: "Ye shall have one manner of law, as well for the stranger as for one of your own country."⁸³ Though this language is most probably a rhetorical flourish by Justice Thurgood Marshall, it planted a problematic seed.⁸⁴ The quoted biblical language fails to make an important distinction: Durational residence requirements are not laws between residents and nonresidents, which the biblical language addresses, but are instead laws distinguishing between two groups of bona fide residents. This distinction is the core of the rationale for applying equal protection review in right to travel cases.⁸⁵

78. *Id.*

79. *Id.* at 259 (quoting *Shapiro*, 394 U.S. at 627).

80. *Id.*

81. See *supra* note 49. This was settled as to welfare aid by *Dandridge*. See *supra* part II.C.1.

82. See *Memorial Hosp.*, 415 U.S. at 258-60.

83. *Id.* at 261 (quoting *Leviticus* 24:22).

84. This seed comes to fruition in the opinions of Justice O'Connor in several later cases. See *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 920 (1986) (O'Connor, J., dissenting); *Zobel v. Williams*, 457 U.S. 55, 73-81 (1982) (O'Connor, J., concurring). See *infra* notes 127-30, 147-48 and accompanying text for the problems with this position.

85. Creating groups between similarly situated individuals is the type of action prohibited by the Equal Protection Clause. See *TRIBE*, *supra* note 47, § 16-1, at 1438; *Zobel*, 457 U.S. at

Also, this case marked the first opinion by Justice William Rehnquist in the right to travel cases.⁸⁶ Justice Rehnquist properly took the Court to task for not specifying "how to distinguish a waiting period which is a penalty from one which is not."⁸⁷ However, Justice Rehnquist failed to note the majority's crucial distinction between migration and travel.⁸⁸ Instead, he focused on travel.⁸⁹ He noted that penalties imposed by toll bridges on individuals entering the state could theoretically be deemed a penalty on travel.⁹⁰ While this is true, such an example ignores the equal protection framework within which the right to travel analysis arises:⁹¹ Such a toll would theoretically apply to all persons entering the state, not single out a special group to pay the toll, and thus would not raise the same equal protection concerns.⁹² The Court has indicated that it has not focused specifically on travel in the recent right to travel cases, but on the ability to change one's domicile.⁹³

Next, Justice Rehnquist wanted the Court to examine "whether the challenged requirement erects a real and purposeful barrier to movement, or the threat of such a barrier, or whether the effects on travel, viewed realistically, are merely incidental and remote."⁹⁴ After noting the "recent vintage" of the *Shapiro* line of cases,⁹⁵ Justice Rehnquist stated that, as the "barrier here is hardly a counterpart to the barriers

60. Obscuring that fact could improperly change the constitutional framework of the right to travel analysis. Such language instead smacks of Privileges and Immunities review, which is problematic. See *infra* notes 127-30, 147-48 and accompanying text.

86. *Memorial Hosp.*, 415 U.S. at 277-88 (Rehnquist, J., dissenting). Though Justice Rehnquist was on the Court at the time *Dunn* was decided, he took no part in the decision. 405 U.S. at 360.

87. *Memorial Hosp.*, 415 U.S. at 284 (Rehnquist, J., dissenting).

88. See *supra* notes 77-78 and accompanying text.

89. See *Memorial Hosp.*, 415 U.S. at 284 (Rehnquist, J., dissenting).

90. *Id.* (Rehnquist, J., dissenting).

91. See *Baker*, *supra* note 42, at 1153 n.134.

92. It is true, however, that the right to travel has its own jurisprudence outside the equal protection/fundamental right analysis. Thus, Justice Rehnquist is correct in stating that an extreme toll, which prevented people from migrating into a state, could in fact be a burden on the right to travel even without drawing group lines and raising equal protection concerns. See *Memorial Hosp.*, 415 U.S. at 284 (Rehnquist, J., dissenting).

93. See *supra* notes 77-78 and accompanying text.

94. *Memorial Hosp.*, 415 U.S. at 285 (Rehnquist, J., dissenting). To some extent, such a requirement harkens back to *Edwards v. California*, 314 U.S. 160 (1941); see *supra* notes 187-88 and accompanying text.

95. *Memorial Hosp.*, 415 U.S. at 283 (Rehnquist, J., dissenting).

condemned in earlier cases,"⁹⁶ the Court should defer to "the State's allocation of its limited financial resources."⁹⁷

Finally, Justice Rehnquist took issue with the Court's dismissal of protection of the public purse as an insufficient state objective.⁹⁸ Typifying his tendency toward legislative deference, he stated that "this sort of judgment has traditionally been confided to legislatures, rather than to courts charged with determining constitutional questions."⁹⁹ However, viewing residence requirements as types of economic legislation that deserve judicial deference undermines the role of equal protection analysis—the framework in which the right to travel analysis occurs.¹⁰⁰

4. *Sosna v. Iowa*

The next case in which the Court defined the parameters of the right to travel doctrine as put forth in *Shapiro* was *Sosna v. Iowa*.¹⁰¹ Decided in 1975, *Sosna* addressed the constitutionality of an Iowa statute requiring individuals to be residents of the state for one year prior to filing a petition for a divorce action.¹⁰² The Court upheld the statute as constitutional.¹⁰³ In a decision written by Justice Rehnquist, the Court distinguished *Shapiro*, *Dunn*, and *Memorial Hospital* by noting that those

96. *Id.* at 285-86 (Rehnquist, J., dissenting). The "earlier cases" referred to are *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), *Williams v. Fears*, 179 U.S. 270 (1900), and *Edwards*, 314 U.S. 160. See *Memorial Hosp.*, 415 U.S. at 288 (Rehnquist, J., dissenting). However, these cases are problematic precedent because they do not use the equal protection framework, which the Court adopted in *Shapiro* and has applied since that decision. See *supra* parts II.B-C. Justice Rehnquist's dissent indicates his unhappiness with the equal protection framework for review.

97. *Memorial Hosp.*, 415 U.S. at 286 (Rehnquist, J., dissenting). Justice Rehnquist is essentially calling for rational basis review.

98. *Id.* at 287 (Rehnquist, J., dissenting).

99. *Id.* (Rehnquist, J., dissenting). Justice Rehnquist's comment is understandable, though misplaced. What Justice Rehnquist objected to was the unnecessary language employed by the majority, indicating that Arizona would actually save money by providing the nonemergency care to new residents because, if indigent, the State would bear the burden of treating the illness once it degenerates to emergency status due to nontreatment. See *id.* at 250. This conclusion that the state is actually not even saving money is, of course, unnecessary to the holding that "[t]he conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State." *Id.* at 263.

100. See *supra* note 85 and accompanying text. Further, the simple fact that a state is spending money does not prevent strict judicial review when a fundamental right is at issue.

101. 419 U.S. 393 (1975).

102. *Id.* at 395. The statute provided: "the petition for dissolution of marriage . . . must state that the petitioner has been for the last year a resident of the state, . . . and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution only." *Id.* at 395 n.1 (referring to IOWA CODE § 598.6 (1973)).

103. *Id.* at 396.

cases involved state justifications based on "budgetary or record-keeping considerations which were held insufficient to outweigh the constitutional claims of the individuals."¹⁰⁴ Here, said the Court, "the durational residency requirement under attack . . . is a part of Iowa's comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States."¹⁰⁵

Having thus distinguished *Shapiro*, the Court added a crucial test to the right to travel analysis, focusing on whether or not the plaintiff in *Sosna* had been "irretrievably foreclosed" from obtaining the relief she sought.¹⁰⁶ Thus, without expressly saying so, the Court added a new element to the penalty analysis begun in *Shapiro* and extended through *Dunn* and *Memorial Hospital*.¹⁰⁷ Now, apparently, a state statute restricting the right to travel does not constitute a penalty unless the statute irretrievably forecloses an individual from the exercise of rights or the receipt of benefits.¹⁰⁸ In *Sosna* the Court held that the plaintiff could "ultimately have obtained the same opportunity for adjudication which she asserts ought to have been hers at an earlier point in time."¹⁰⁹

However, the Court seems to have done more than simply determine whether the plaintiff had been irretrievably foreclosed from obtaining a benefit. Instead, the Court took an approach similar to

104. *Id.* at 406.

105. *Id.* at 404. The Court relied on several cases that attributed to the state the "absolute right to prescribe the conditions upon which the marriage relation . . . shall be created, and the causes for which it may be dissolved." *Id.* (quoting *Pennoy v. Neff*, 95 U.S. 714, 734-35 (1878)).

106. *Id.* at 406.

107. See *supra* notes 54-85 and accompanying text for a discussion of the origin and extension of right to travel penalty analysis.

108. The Court distinguished the welfare recipients in *Shapiro*, the voters in *Dunn*, and the indigent patient in *Memorial Hospital*. *Sosna*, 419 U.S. at 406. At first glance this distinction seems to be weak. While the *Shapiro* and *Memorial Hospital* plaintiffs were completely denied benefits for a period of time and could never thereafter recoup those benefits, such is not true of the voters in *Dunn*. In *Dunn*, after one year, new residents would be able to vote like older residents. The three cases, however, can be reconciled: *Dunn*'s deprivation of the right to vote makes sense if voting is defined as the specific opportunity to vote at a specific election. Thus, if a new resident cannot vote for a county official because an election occurs six months after his or her arrival in the state, that resident has been irretrievably foreclosed from voting in that specific election. Consequently, the "irretrievably foreclosed" standard is properly applied to voting statutes.

Unfortunately, if voting can be cast in that light, so, too, can divorce. Under the *Sosna* facts, the plaintiff is irretrievably foreclosed from obtaining a speedy divorce during her initial year of residence. Like the deprived voter, she has missed an opportunity—to obtain a divorce when she wanted one. Arguably, an immediate divorce is not equivalent to a divorce a year from now. *Id.* at 422 (Marshall, J., dissenting) (discussing costs involved in having to wait one year to file divorce petition). Thus, the "irretrievably foreclosed" language is misleading.

109. *Id.* at 406.

Memorial Hospital, focusing on the severity of the deprivation,¹¹⁰ and whether the benefit or opportunity denied was fungible. By considering these additional factors, the Court determined how willing it was to accept the delay caused by the waiting period. In *Sosna* the Court seemed to imply that speedy divorce grants, unlike welfare payments, medical care, or voting, are rather fungible and unimportant.¹¹¹ To the Court the difference between obtaining a divorce in one month or one year made little substantive difference.¹¹² In *Shapiro, Dunn*, and *Memorial Hospital*, the deprivations were all serious—either basic necessities of life or the fundamental right to vote.¹¹³ Moreover, the benefits were not fungible—the recipient is not made whole by receiving welfare, medical care, or the right to vote one year after the benefit was needed.¹¹⁴ Thus, measuring the seriousness of the deprivation seems to be a more proper understanding of the “irretrievably foreclosed” notion and of the distinction between *Sosna* and the three earlier cases.

The greatest difficulty of *Sosna*, however, is determining the Court’s reasoning in deciding whether the statute was constitutional. Was a strict scrutiny review not triggered because the statute failed to constitute a penalty since the plaintiff was not irretrievably foreclosed? Or was rational basis review utilized from the outset? Because the Court first determined the issue of regulation of marriage to be traditionally the province of the states, rather than decide whether the right to travel had been penalized, this opinion smacks of rational basis review.¹¹⁵ Justice Marshall best summed up this problem, stating in his dissent that instead of following equal protection analysis, “the Court has employed what appears to be an *ad hoc* balancing test, under which the State’s putative interest in ensuring that its divorce petitioners establish some roots in Iowa is said to justify the one-year residency requirement.”¹¹⁶ This decision made even more precarious the already confusing realm of the right to travel.

110. See *supra* notes 80-82 and accompanying text.

111. *Sosna*, 419 U.S. at 406-07.

112. *Id.* at 421 (Marshall, J., dissenting).

113. See *supra* notes 44-100 and accompanying text for a discussion of these cases.

114. See *Sosna*, 419 U.S. at 406.

115. See *id.* at 404. Rather than asking if the right has been penalized, the Court apparently tried to find any excuse to apply rational basis review. Nevertheless, by including the “irretrievably foreclosed” notion in the penalty analysis, the result is the same—the statute is held not to be a penalty and rational basis review is applied.

116. *Id.* at 419 (Marshall, J., dissenting).

5. *Zobel v. Williams*

The next case to address the right to travel took a new procedural twist¹¹⁷ and did little to place right to travel analysis back on firm footing. In *Zobel v. Williams*,¹¹⁸ decided in 1982, the Court struck down an Alaska statute that divided income derived from the state's natural resources among citizens based on length of residence.¹¹⁹ Though the statute did not deal with durational residence requirements, but instead involved a "fixed-point" residence requirement,¹²⁰ the case is still relevant to the consideration of durational residence requirements for several reasons.

First, *Zobel* introduced a new order for analyzing right to travel cases. Rather than first determining which standard of review was relevant and then applying that standard, the Court stated that "[i]n any event, if the statutory scheme cannot pass even the minimal test proposed by the State, we need not decide whether any enhanced scrutiny is called for."¹²¹ After noting that two of the proposed state purposes for the law were not rationally related to the distinctions between new and old residents,¹²² the Court regarded Alaska's proposed justification of the statute

117. See *infra* notes 121-26 and accompanying text.

118. 457 U.S. 55 (1982). This case is also famous for its application of "rational basis with teeth," or "second order" rational basis review. See *TRIBE, supra* note 47, §§ 16-2 to 16-3, at 1443-44. Professor Tribe observed that the second order rational basis test applied in *Zobel* seemed

more the result of dissatisfaction with the existing tools of equal protection analysis for dealing with "fixed permanent distinctions between . . . classes of concededly bona fide residents, based on how long they have been in the State," than of any overall shift in the Court's scrutiny of how well various purposes fit legislatively chosen means.

Id. § 16-2, at 1441-42 (quoting *Zobel*, 457 U.S. at 59).

119. *Zobel*, 457 U.S. at 65. All Alaska residents received dividends from the permanent fund, though older residents received larger shares. Thus, unlike *Shapiro* and its progeny, no residents were being denied benefits. All residents received something that they would not otherwise have received. Justice Rehnquist, in his dissent, seized upon this fact and found the right to travel cases inapplicable. *Id.* at 83 (Rehnquist, J., dissenting). The statute, however, still distinguished residents based on how recently they moved to the state in order to determine the size of the dividends. *Id.* at 57.

120. A fixed-point residence requirement, as opposed to a durational residence requirement, "creates fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State." *Id.* at 59.

121. *Id.* at 60-61. This approach, criticized by the dissenters, was later abandoned. See *infra* note 140 and accompanying text.

122. The offered justifications were: (1) providing an incentive to establish and maintain residence in Alaska; (2) encouraging prudent management of the fund that distributed the dividends from the natural resources; and (3) rewarding past contributions. *Zobel*, 457 U.S. at 61, 63. As discussed above, this is hardly the ordinary rational basis test. See *TRIBE, supra* note 47, §§ 16-2 to 16-3, at 1439-46.

as rewarding its citizens for past contributions.¹²³ Reiterating *Shapiro*, the Court held that this was "not a legitimate state purpose"¹²⁴ and struck down the statute as unconstitutional without proceeding to strict scrutiny.¹²⁵ By taking such a course, the Court shifted the focus of the right to travel analysis away from determining if the right had been penalized. The Court, thus, further confused the issue of when strict scrutiny should be applied.¹²⁶

Second, *Zobel* gives some insight into the views of several members of the current Court concerning the right to travel. Justice O'Connor, in her concurrence, indicated her desire to place the right to travel analysis within the Privileges and Immunities Clause of Article IV.¹²⁷ Though Justice O'Connor noted that the Alaska statute discriminated among residents, not among residents and nonresidents,¹²⁸ she argued that the Privileges and Immunities Clause "addresses just this type of discrimination,"¹²⁹ and would have invalidated the Alaska statute under that clause.¹³⁰ Justice Rehnquist, on the other hand, regarded the statute as a

123. *Zobel*, 457 U.S. at 63-64.

124. *Id.* at 63. However, Justice O'Connor in her concurrence noted the recurrence of a problem that arose in *Shapiro*: Nothing in the Fourteenth Amendment makes rewarding citizens for past contributions an illegitimate state interest. *Id.* at 73-75 (O'Connor, J., concurring); see *supra* note 51; *infra* notes 134-35 and accompanying text.

125. *Zobel*, 457 U.S. at 65.

126. The *Zobel* Court made no mention of the penalty analysis that previously had been the core of the right to travel cases. However, in defense of the Court, this new "rational basis first" approach may simply have been an exercise in judicial economy. Faced with a statute having three proffered justifications, where two are irrational and one is impermissible, there arguably was no need to do a penalty analysis.

127. *Zobel*, 457 U.S. at 73-81 (O'Connor, J., concurring). "[T]his analysis supplies a needed foundation for many of the 'right to travel' claims discussed in the Court's prior opinions." *Id.* at 74 (O'Connor, J., concurring).

Though it is at least arguable that the policy underlying the Privileges and Immunities Clause is in fact aimed at this type of discrimination, a Privileges and Immunities Clause right to travel analysis is problematic for several reasons. As Justice O'Connor herself points out, the discrimination is occurring among classes of residents, not among residents and nonresidents. *Id.* at 73 (O'Connor, J., dissenting). Thus, it is very possible that the Privileges and Immunities Clause, by its own language, does not even apply. See *Mitchell v. Steffen*, 487 N.W.2d 896, 905 (Minn. Ct. App. 1992) (durational residence requirement did not present Privileges and Immunities Clause claim). Professor Tribe, however, suggests that this clause is in fact a viable solution. See *TRIBE*, *supra* note 47, § 7-4, at 558-59, § 16-8, at 1455 n.3. Nevertheless, even if the clause does apply, Equal Protection Clause analysis applies as well and is in fact more specifically tailored for problems involving groupings of similarly situated residents. See *id.* at § 16-1.

128. *Zobel*, 457 U.S. at 75 (O'Connor, J., concurring).

129. *Id.* at 73 (O'Connor, J., concurring). "The fact that this discrimination unfolds after the nonresident establishes residency does not insulate Alaska's scheme from scrutiny under the Privileges and Immunities Clause." *Id.* at 75 (O'Connor, J., concurring).

130. *Id.* at 78 (O'Connor, J., concurring). Interestingly, in applying the Privileges and Immunities Clause, Justice O'Connor noted that "[c]ertainly the right infringed in this case is

"distribution scheme being in the nature of economic regulation."¹³¹ Because "state economic regulations are presumptively valid,"¹³² Justice Rehnquist found the majority's invalidation of the statute under equal protection irrational.¹³³ Also, like Justice O'Connor, Justice Rehnquist found fault with the majority's dismissal of the state's justification of recognizing past contributions as illegitimate.¹³⁴ Noting that the Alaska statute encouraged rather than penalized travel, Justice Rehnquist found the right to travel cases inapplicable.¹³⁵

6. *Attorney General v. Soto-Lopez*

In *Attorney General v. Soto-Lopez*,¹³⁶ the last significant case prior to the current resurgence of durational residence requirements in which the Court discussed the right to travel, Justice Brennan's methodical majority opinion placed the right to travel analysis on firmer footing. In *Soto-Lopez*, the Court addressed a New York statute that gave a civil service preference to current resident veterans who were also residents of New York at the time they entered military service.¹³⁷ In scrutinizing the constitutionality of the statute, the Court presented the most recent and clear annunciation of the current right to travel analysis.

The Court first noted the historic existence of the fundamental right to travel, using the more precise "right of free interstate migration" label.¹³⁸ Then, the Court observed that "[a] state law implicates the right

'fundamental.' Alaska's statute burdens those nonresidents who choose to settle in the State. It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State." *Id.* at 76-77 (O'Connor, J., concurring).

131. *Id.* at 81 (Rehnquist, J., dissenting).

132. *Id.* (Rehnquist, J., dissenting).

133. *Id.* at 82-83 (Rehnquist, J., dissenting). This is similar to his dissent in *Memorial Hospital*. See *supra* notes 94-99 and accompanying text.

134. *Zobel*, 457 U.S. at 82-83 (Rehnquist, J., dissenting); see *id.* at 72 (O'Connor, J., concurring). Some commentators have also questioned the Court's condemnation of rewarding older residents. See, e.g., Kathryn D. Katz, *More Equal Than Others: The Burger Court and the Newly Arrived State Resident*, 19 N.M. L. REV. 329 (1989).

135. *Zobel*, 457 U.S. at 83 (Rehnquist, J., dissenting). Though it is true that all residents receive a benefit they would not receive otherwise, equal protection analysis does not end there. The fact that a benefit is offered to new residents does not shield the statute distributing the benefits if that statute makes impermissible classifications based on how recently a person exercised his or her constitutional right to migrate. By offering some benefits to new residents, the state may not "buy up" the constitutional rights of new residents. Nor may it buy its way out of the equal protection analysis.

136. 476 U.S. 898 (1986).

137. *Id.* at 899.

138. *Id.* at 902. The Court also reiterated the lack of constitutional source for the right to travel by acknowledging that "we have not felt impelled to locate this right definitively in any particular constitutional provision Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases." *Id.* at 902-03. As in *Shapiro*,

to travel when it actually deters such travel . . . when impeding travel is its primary objective . . . or when it uses 'any classification which serves to penalize the exercise of that right.'"¹³⁹

Thus, the Court refocused the right to travel on penalty analysis. In doing so, the majority synthesized the elements of *Shapiro* and its progeny into a clear test. The Court must first determine "whether [the statute] operates to penalize those persons who have exercised their right to migrate. If we find that it does, [the statute must fail] unless [the state] can demonstrate that its classification is necessary to accomplish a compelling state interest."¹⁴⁰ The Court noted that "even temporary deprivations of very important benefits and rights can operate to penalize migration."¹⁴¹

The Court then analyzed the New York statute under this test. Though finding the interest in *Soto-Lopez* to be less substantial than those in either *Shapiro* or *Dunn*, the Court nonetheless found the interest substantial enough to trigger strict scrutiny.¹⁴² The Court held that "[s]uch a permanent deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time, clearly operates to penalize [them] for exercising their rights to migrate."¹⁴³ After finding a penalty on the right to migrate, the Court applied strict scrutiny review. The Court held that all four of the state's asserted interests¹⁴⁴ failed to withstand heightened scrutiny for lack of narrow tailoring.¹⁴⁵ The Court

the lack of an express constitutional source for the right to travel does not hamper its application. See *supra* notes 41-43 and accompanying text discussing the "sourceless right to travel."

139. *Soto-Lopez*, 476 U.S. at 903 (quoting *Shapiro*, 394 U.S. at 634).

140. *Id.* at 906. Thus, the Court effectively abandoned the "rational basis first" style of review which the Court used in *Zobel*. See *supra* notes 121-22 and accompanying text discussing this unique procedural approach adopted in *Zobel*. Chief Justice Burger, in his concurrence in *Soto-Lopez*, maintained that this *Zobel* method of analysis is proper, because if the statute is invalid under rational basis review, then any holding based on the right to travel and strict scrutiny is unnecessary. *Soto-Lopez*, 476 U.S. at 913 (Burger, C.J., concurring).

141. *Soto-Lopez*, 476 U.S. at 907.

142. The Court noted that "[w]hile the benefit sought here may not rise to the same level of importance as the necessities of life and the right to vote, it is unquestionably substantial." *Id.* at 908. The Court also noted the effect of the veteran's credits on obtaining employment, job security, good pay, and benefits, as well as the fact that the individuals had "been permanently deprived of the veteran's credits that they [sought]." *Id.* at 909. Note the incorporation of the *Sosna* "irretrievably foreclosed" element into the penalty analysis. See *supra* part II.C.4.

143. *Soto-Lopez*, 476 U.S. at 909.

144. The asserted state justifications were: "(1) the encouragement of New York residents to join the Armed Services; (2) the compensation of residents for service in time of war . . . ; (3) the inducement of veterans to return to New York . . . ; and (4) the employment of a 'uniquely valuable class of public servants.'" *Id.*

145. *Id.*

held that "each of the State's asserted interests could be promoted fully by granting bonus points to *all* otherwise qualified veterans."¹⁴⁶

Unfortunately, Justice O'Connor's dissent, joined by Justices Rehnquist and Stevens, is problematic. Though by now an accepted piece of constitutional analysis, Justice O'Connor reiterated her disdain for the "sourceless" right to travel.¹⁴⁷ She repeated her belief that the right to travel is more properly placed within the Privileges and Immunities Clause of Article IV.¹⁴⁸ Also, she continued to advocate the position that compensating citizens for prior contributions is neither inherently invidious nor irrational.¹⁴⁹ Justice O'Connor also disagreed that the right to travel had been burdened, noting that the benefit was not very significant, in that it only increased the chance of employment but did not guarantee it,¹⁵⁰ and thus she found heightened scrutiny inappropriate.¹⁵¹ Justice O'Connor would require that "something more than the minimal effect on the right to travel or migrate that exists in this case must be required to trigger heightened scrutiny."¹⁵²

Thus, following *Soto-Lopez*, the question still exists: How much of an effect must a state law have on the right to travel in order to constitute a penalty and trigger strict scrutiny? Though the Court in *Soto-Lopez* delineated the analysis to be used in right to travel cases,¹⁵³ it did not fully answer that question. However, the majority in *Soto-Lopez* does seem to have favored finding a penalty. Though a penalty on the right to travel was found in that case, it is certainly nowhere near as severe as the deprivations in *Shapiro*, *Dunn*, or *Memorial Hospital*. Unfortunately, rather than admit the low significance of the deprivation and hold that even deprivations of this low magnitude penalize the right to travel, the majority asserted that the interest was substantial, and thus found the deprivation to be a penalty.¹⁵⁴ However, though the *Soto-Lopez* majority found a penalty, at least three members of the current Court would not

146. *Id.*

147. *Id.* at 920 (O'Connor, J., dissenting). Justice O'Connor previously admitted that the right to travel is both a fundamental right and possibly the right most "essential to the Nation as a whole." *Zobel*, 457 U.S. at 76-77 (O'Connor, J., concurring); see *supra* note 130 and accompanying text.

148. *Soto-Lopez*, 476 U.S. at 920 (O'Connor, J., dissenting). See *supra* notes 127-30 discussing Justice O'Connor's view and its problems.

149. *Soto-Lopez*, 476 U.S. at 920 (O'Connor, J., dissenting) (quoting *Zobel*, 457 U.S. at 72 (O'Connor, J., concurring)).

150. *Id.* at 922 (O'Connor, J., dissenting).

151. *Id.* at 924 (O'Connor, J., dissenting).

152. *Id.* at 925 (O'Connor, J., dissenting).

153. See *supra* notes 139-41 and accompanying text.

154. *Soto-Lopez*, 476 U.S. at 908.

have found the deprivation in *Soto-Lopez* to be substantial and thus not a penalty on the right to travel.¹⁵⁵ Furthermore, of the majority, five are no longer on the Court.¹⁵⁶ But, knowing that some current Justices would not have found a penalty in *Soto-Lopez* still does not answer the threshold question of when strict scrutiny is required. It is into this morass that state legislators have recently waded, tempting the Court to finally draw a line that allows them to discriminate against indigent new residents.

III. MOTIVES UNDERLYING THE ENACTMENT OF DURATIONAL RESIDENCE REQUIREMENTS

Though part II presents the legal framework into which the new durational residence requirements for welfare aid enter, these statutes cannot be properly analyzed within that framework without an understanding of the motivations and assumptions that underlie any consideration of welfare reform. This part provides that background by considering the viability of the welfare magnet theory, the historical discrimination against indigent individuals, and the public dissatisfaction with the welfare system in general.

A. *The Welfare Magnet Theory*

The most prominent—and also one of the most constitutionally impermissible—reason for adopting durational residency requirements for receipt of public assistance is the notion that the poor move to states that pay the highest benefit levels.¹⁵⁷ California and many other “high-benefit” states¹⁵⁸ have clearly stated that their residence requirements have been enacted for the very purpose of discouraging interstate migration by indigent individuals.¹⁵⁹

155. *Id.* at 925 (O'Connor, J., dissenting).

156. Of the *Soto-Lopez* Court, Chief Justice Burger and Justices Marshall, Powell, White, and Brennan have retired.

157. *Shapiro v. Thompson*, 394 U.S. 618 (1969), made it very clear that a state may not selectively admit some as residents and not others: “A State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally.” *Id.* at 631.

158. See *infra* notes 167-74 and accompanying text for a discussion of the problems with this ranking.

159. Governor Pete Wilson of California has in fact openly stated that he feels the *Shapiro* line of cases is wrong:

“[W]e will have to minimize the magnetic effect of the generosity of this state . . . I happen to think [the *Shapiro* line of cases is] wrong . . . It seems to me that at the very least there should be a period in which new residents do not receive the benefits that the state provides. . . . Otherwise, . . . you are risking the health of your economic base.”

On its face it seems reasonable that the poor might gravitate to states in which they would receive increased benefits. And apparently, legislators are making decisions based on this generalized understanding without further study. For example, when asked what percentage of welfare recipients are new residents, the administration in California admitted that, while statistics were unavailable, "it stands to reason that the poor move here to take advantage of higher benefits."¹⁶⁰ Thus, because of a lack of hard information, the welfare magnet theory has perpetuated unfounded assumptions. Social science researchers, however, have broken this trend, compiling reports about the movement of indigents and the composition of states' welfare rolls. This research indicates that the welfare magnet theory—even if true—is exaggerated.¹⁶¹

Were the welfare magnet effect real, one would expect a gradual shifting of the poor from low-benefit to high-benefit states. This has not occurred.¹⁶² Evidence from census data indicates that the movement of

Weintraub, *supra* note 15, at A3, A45; see Julie Kosterlitz, *Behavior Modification*, 24 NAT'L J. 271 (1992); see also Thomas Corbett, *The Wisconsin Welfare Magnet Debate: What is an Ordinary Member of the Tribe to Do When the Witch Doctors Disagree?*, FOCUS (U. Wis., Madison), Fall & Winter 1991, at 19, 23 (proposal to Wisconsin legislature for imposing residence requirement based on perceived magnet effect of AFDC benefits); Bob Secter, *Welfare Trims Proposed to Cut Migration to Wisconsin*, N.Y. TIMES, Feb. 5, 1989, at A1 (legislator states: "We simply want to take away the incentive to come to Wisconsin.").

160. Weintraub, *supra* note 15, at A45.

161. See JOHN B. LANSING & EVA MUELLER, *THE GEOGRAPHIC MOBILITY OF LABOR* 345 (1967) (welfare aid may provide some moderate incentive to move, but not shown conclusively); Gordon F. De Jong & William L. Donnelly, *Public Welfare and Migration*, 54 SOC. SCI. Q. 329, 342-44 (1973) (perceived greater availability of program assistance did not correlate in consistent pattern with migration behavior); Robert Moffitt, *Incentive Effects of the U.S. Welfare System: A Review*, 30 J. ECON. LITERATURE 1, 56 (1992) (evidence of effects on interstate migration is suggestive but inconclusive); Alan M. Schlottmann & Henry W. Herzog, Jr., *Employment Status and the Decision to Migrate*, 63 REV. ECON. & STAT. 590, 597 (1981) (provision of welfare services had little or no impact on migration decision). But see Corbett, *supra* note 159, at 20 (research results have been mixed); Lawrence Southwick, Jr., *Public Welfare Programs and Recipient Migration*, GROWTH & CHANGE, Oct. 1981, at 22, 29-30 (welfare payment incentives do induce migration by welfare recipients, but migration occurs for many reasons other than welfare). Note, however, that some of these studies were based on data gathered from a time when durational residence requirements were in place. Thus, these studies may not accurately measure the unrestrained magnet effect of state aid, since some indigents may have been discouraged from moving because they would have been subject to durational residence requirements.

162. Any migration that does occur is in very small numbers. From 1974 to 1981, only approximately seven percent of AFDC recipients in the low-benefit states moved out of state, and approximately three percent of AFDC recipients in high-benefit states moved out of state. Edward M. Gramlich & Deborah S. Laren, *Migration and Income Redistribution Responsibilities*, 19 J. HUM. RESOURCES 489, 505-06 (1984).

Seemingly, even at this sluggish rate, the poor would gravitate to the higher-benefit states. However, scholarship indicates that it is the correlation with the general state economy, the availability of jobs and training programs, and educational facilities provided by the state—not

families below the poverty level generally follows the same pattern of movement as the population as a whole.¹⁶³ In fact recent California studies do not support the welfare magnet theory.¹⁶⁴ Most current analysts agree that, though benefit levels play a part in an indigent's decision to change his or her domicile, it is not the controlling factor.¹⁶⁵ Instead, availability of jobs, average earnings, and unemployment seem to be the critical factors.¹⁶⁶ Like the rest of the population, indigents move for many reasons, not simply for welfare benefits.

Another problem with the welfare magnet theory is the perception that a state is providing high-benefit levels. Obviously, no legislature could believe the welfare magnet theory would be drawing indigents to its state if it was not a high-benefit state. Logically, those states that worry about the welfare magnet effect must consider themselves to be high-benefit states as opposed to their sister states.

A state's perception of itself as high-benefit is often misleading. Benefit levels are normally measured by the dollar amount of grants to

benefit levels—that explains the migration of indigent individuals. See LANSING & MUELLER, *supra* note 161, at 336-40 (economic opportunities guided migration); De Jong & Donnelly, *supra* note 161, at 342 (potential economic advancement is more important factor); Schlottmann & Herzog, *supra* note 161, at 597-98 (correlation between education and decision to migrate for economic opportunity). Further, indigent migration mirrors that of the general population. See U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS (1989) (No. 430, Series P-20) (covering period March 1986 to March 1987).

163. See U.S. BUREAU OF THE CENSUS, *supra* note 162.

164. Studies indicate that "the data . . . [does] not lend support to the theory that California has a larger percentage of its population on AFDC because eligible families are moving to California in order to take advantage of higher grant levels." LEGISLATIVE ANALYST, PUBLIC ASSISTANCE FACTS & FIGURES 53 (1984).

165. See LANSING & MUELLER, *supra* note 161, at 345-46; De Jong & Donnelly, *supra* note 161, at 342; Schlottmann & Herzog, *supra* note 161, at 597-98. All three studies found that the unemployed were not deterred from moving out of a state by knowing that that state paid a relatively higher welfare benefit, and that the receipt of AFDC in a high-benefit state did not play a significant part in the decision to choose not to migrate to another state with greater job opportunities but lower AFDC benefits.

Of course to find that benefit levels play no part whatsoever in a decision to relocate is unrealistic. However, as noted in *Shapiro*, implicit in these durational residence requirement schemes

is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.

Shapiro, 394 U.S. at 631-32.

166. See Schlottmann & Herzog, *supra* note 161.

Aid to Families with Dependent Children (AFDC) families.¹⁶⁷ By this measure, Alaska, Connecticut, Vermont, Hawaii, and California are traditionally the five highest benefit states.¹⁶⁸ Yet, a strikingly different ranking is obtained if the states are compared based on "disposable" grant levels—defined by combining the state AFDC grant with the state food stamp grant and subtracting from that total the average fair market rent for a two-bedroom apartment in the state.¹⁶⁹ Some so-called high-benefit states fall significantly in these rankings.¹⁷⁰ California, for example, which ranks fifth in absolute dollar amount of aid falls into thirtieth place on this "relative benefit" scale.¹⁷¹ The state provides only \$100 in combined AFDC plus food stamps minus fair rental value,¹⁷² which is well below the national average of \$138.¹⁷³ Likewise, Connecticut and Vermont, traditionally considered high-benefit states, drop from their top-five ranking.¹⁷⁴

Thus, not only do states misperceive the magnetic effect of welfare programs, they also often misidentify themselves as high-benefit states by focusing only on the absolute dollar amount of their welfare grants rather than benefit levels adjusted for relative cost of living. Proponents of the welfare magnet theory could argue that using an adjusted ranking system

167. Benefit level is traditionally measured by dollar amount of the grant for a typical family situation. A family of three is statistically the most common AFDC family. *See* MICHAEL S. WALD, THE STANFORD CENTER FOR THE STUDY OF FAMILIES, CHILDREN, AND YOUTH, WELFARE REFORM AND CHILDREN'S WELL-BEING 14 (1992). Approximately 71-74% of AFDC families have two or fewer children. STATISTICAL SERVS. BUREAU, DEP'T OF SOCIAL SERVS., AFDC CHARACTERISTICS SURVEY, STUDY MONTH OF JANUARY 1992 (1992) (Program Information Series Report No. 1992-02) (hereinafter DSS CHARACTERISTICS SURVEY).

168. Ranked by dollar grant to families of three, the five highest benefit states are: Alaska (\$924); Connecticut (\$680); Vermont (\$673); Hawaii (\$666); and California (\$663). WALD, *supra* note 167, app. B, at 43.

169. This Comment adopts a ranking system based on figures provided by the Stanford Center for the Study of Families, Children, and Youth. *See id.* Though this system does not completely account for the difference in cost of living in the different states, it is an easily figured statistic which approximates the cost of living. *Id.*

170. Based on "disposable grant levels," the highest benefit states are ranked: Alaska (\$634); Georgia and Hawaii (\$377); West Virginia (\$334); Wisconsin (\$278); and Utah (\$258). The national average is \$138. *Id.*

171. This drop in ranking is due mostly to the low amount of state food stamp aid and the high rental value in the state. *See id.* at 15, app. B, at 43. Though this drop is exacerbated by high rental values in Los Angeles, San Diego, and Orange Counties, which drive up the state rental average, Los Angeles County constitutes 30% of California's AFDC caseload. *Id.* at 15.

However, utilizing fair rental value is especially appropriate in California, since only 12% of the state's AFDC families live in public housing or receive housing subsidies, ranking California 50th in the nation. *Id.* at 11.

172. *Id.* at app. B, at 43.

173. *Id.*

174. *Id.*

is misleading because potential immigrants are likely to be aware of only the absolute benefit level in the new state. Census data, however, does not bear out the welfare magnet theory.¹⁷⁵ Potential migrants are either more sophisticated—and take into account cost of living—or welfare benefits are not a controlling factor in their decision to migrate.

Further, even if accurate, enacting a durational residence requirement in response to the welfare magnet problem is constitutionally impermissible. As noted in *Shapiro v. Thompson*:

[T]he purpose of deterring the in-migration of indigents cannot serve as [a] justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.'¹⁷⁶

Thus, barring indigents from entry into the state—even if to remedy the perceived welfare magnet effect of the state—is impermissible.

In dicta the *Shapiro* Court also indicated that narrowing such a law to bar only indigents who enter for the sole purpose of receiving higher benefits is also impermissible. The Court noted that "a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally."¹⁷⁷ Thus, the welfare magnet theory, even if not illusory, is not a permissible state goal—regardless of its facial appeal. As such, any legislation based on a constitutionally impermissible goal must be invalid, regardless of the level of scrutiny applied by the reviewing courts.

Moreover, new residents generally comprise a very small percentage of the state welfare rolls. For example, California census data indicates that in 1989, approximately seven percent of those who received public assistance were residents of another state during the previous year.¹⁷⁸ This closely parallels California's growth rate.¹⁷⁹ Thus, new residents are not being drawn to the so-called high-benefit states because of the benefit levels, and those who do migrate are relatively few. The welfare magnet theory is mostly myth and certainly does not justify singling out

175. See *supra* notes 163-64 and accompanying text.

176. *Shapiro*, 394 U.S. at 631 (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968)).

177. *Id.* at 631-32.

178. WALD, *supra* note 167, at 30; see also *Green v. Anderson*, 811 F. Supp. 516, 517 n.4 (E.D. Cal. 1993) (6.6% of state AFDC caseload resided within another state within year before applying for aid in California).

179. See U.S. BUREAU OF THE CENSUS, *supra* note 162.

a class of citizens for specific discriminatory treatment. To the extent that the new breed of durational residence requirements are based on the constitutionally impermissible objective of deterring immigration of indigent individuals into the state, these requirements must be invalid.

B. Discrimination Against Indigent New Residents

There has been a long and unique nexus between indigence and the right to travel. As long as there has been a right to travel, that right has been denied to indigents. While William Blackstone and the English common-law tradition recognized a right to travel,¹⁸⁰ there was at the same time a strong common-law right of the sovereign to exclude paupers.¹⁸¹ Such discrimination is exemplified by the Elizabethan Poor Law of 1601,¹⁸² which allowed relocation of burdensome indigent individuals.¹⁸³

The American colonies adopted this same pattern of discrimination.¹⁸⁴ The Articles of Confederation, the first American source for the right to travel, reflects the impact of the English common-law tradition of exclusion:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these states, *paupers, vagabonds and fugitives from justice excepted*, shall be entitled to all privileges and immunities of free citizens in the several states, and the people of each state shall have free ingress and regress to and from any other state¹⁸⁵

Also, the colonial states had systems of "warning out" in which indigent individuals were essentially relocated back from whence they came.¹⁸⁶

Not surprisingly, most of the major right to travel cases have involved indigent individuals and an attempt to exclude them. In *Edwards*

180. See *supra* note 39.

181. For a discussion of this area of the law, which is beyond the scope of this Comment, see Berger, *supra* note 41, at 853-54; Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CAL. L. REV. 175, 177-83 (1955); Rosenheim, *supra* note 49, at 307-13; Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 635-38 (1992).

182. 43 Eliz. 1, ch. 2 (Eng.).

183. See Corbett, *supra* note 159, at 20; Riesenfeld, *supra* note 181, at 177-83; Rosenheim, *supra* note 49, at 307-13.

184. *Shapiro*, 394 U.S. at 628 n.7; see Corbett, *supra* note 159, at 20; Riesenfeld, *supra* note 181, at 177-83; Rosenheim, *supra* note 49, at 307-13; Simon, *supra* note 181, at 638-39.

185. ARTICLES OF CONFEDERATION art. IV, para. 1 (1781) (emphasis added).

186. See DOUGLAS L. JONES, *VILLAGE AND SEAPORT* 43, 47 (1981); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 20, 130 (1992); see also JOSIAH BENTON,

*v. California*¹⁸⁷ the Court invalidated a California law that discouraged migration of indigents into the state by making it a crime to knowingly bring, or assist in bringing, indigent nonresidents into the state.¹⁸⁸ Also, *Shapiro* dealt with durational residence requirements for the receipt of welfare aid.¹⁸⁹ Thus, the English Poor Law, the Articles of Confederation, the early colonial laws, and the case history all demonstrate a desire by the states to keep indigent individuals at bay.¹⁹⁰

C. Public Dissatisfaction with the Welfare System

Another impetus behind current welfare reform is general dissatisfaction with the workings of the welfare system.¹⁹¹ Those who study the system find that it is inadequate to meet the needs of the individuals it

WARNING OUT IN NEW ENGLAND (1992); Corbett, *supra* note 159, at 20; Riesenfeld, *supra* note 181, at 177-83; Rosenheim, *supra* note 49, at 307-13.

Some commentators have used this historic discrimination to argue that durational residence requirements are constitutional simply because the states have always done it. See Berger, *supra* note 41, at 855-61.

187. 314 U.S. 160 (1941).

188. *Id.* at 174. The Court invalidated § 2615 of the California Welfare and Institutions Code, which provided that "[e]very person, firm or corporation or officer or agent thereof that brings or assists in bringing into the state any indigent person who is not a resident of the state, knowing him or her to be an indigent person, is guilty of a misdemeanor." *Id.* at 171.

189. See *supra* part II.B.

190. Also, though not traditionally a suspect class for equal protection purposes, see *TRIBE*, *supra* note 47, §§ 16-35 to 16-37; see also *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), new resident indigents are nevertheless subject to some of the problems suffered by members of suspect classes. The historical animus—as discussed above—is certainly a trait that new resident indigents share with members of suspect classes. New resident indigents are at best only virtually represented in the state political process. They more than likely were not in the state when such laws were passed, and thus must rely only on the good will of current residents not to discriminate against them. See *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938); see also Arnold H. Loewy, *A Different and More Viable Theory of Equal Protection*, 57 N.C. L. REV. 1, 42-43 (poor are analogous politically to racial minority).

191. Welfare programs are seen as a drain in an era of "me first" thinking and as a public service that few in the politically active majority need to draw on. Yet another problem is the stereotype of the welfare mother as being very young and having many children. Though to be eligible for AFDC funds, the household must be led by a single parent and that parent is usually the mother, a vast majority of these mothers are between 20 and 39 years old. *WALD*, *supra* note 167, at 13-14. Only 7.7% of female recipients are under 20 years old and only 1.8% are under 18. *Id.* at 14. Also, unlike the common stereotype, most AFDC families are small, with 70% of the households having only one or two children. *Id.* Only 4% of the households have five or more children. *Id.*

was designed to protect.¹⁹² Recipients find the system demeaning.¹⁹³ Critics worry that the current structure encourages individuals to rely on welfare when they could otherwise be self-sufficient, discourages recipients from working, allows some recipients to remain in the system longer than necessary, and fails to provide a route to self-sufficiency for those in the system.¹⁹⁴ This dissatisfaction has heightened the need for legislation perceived as welfare reform.

Since dissatisfaction with welfare is high, and the welfare magnet theory seems intuitively correct, it is hardly surprising that little objection is made to legislative decisions enacting durational residence requirements. All of these factors—belief in the illusory welfare magnet theory, historic discrimination against out-of-state indigents, and public dissatisfaction with welfare programs—combine to make the enactment of durational residence requirements an inviting idea.¹⁹⁵ It is against the backdrop of these assumptions, facts, and trends that any analysis of current durational residence requirements must be made.

192. Children receive approximately 70% of all AFDC and general assistance funds. WALD, *supra* note 167, at 3. In fact, AFDC payments provide—depending on the method of measurement—as little as 37% of the United States median family income. See PATRICIA RUGGLES, DRAWING THE LINE: ALTERNATIVE POVERTY MEASURES AND THEIR IMPLICATIONS FOR PUBLIC POLICY 44-46 (1990). For a discussion of the difficulty of measuring poverty and the poverty line, see *id.*; Robert Haveman, *Changing the Poverty Measure: Pitfalls and Potential Gains*, FOCUS, Winter 1992-1993, at 24.

193. WALD, *supra* note 167, at 5.

194. See generally *id.* (discussing problems with welfare system); *The New Welfare Debate: What the States Are Hoping to Accomplish*, AM. ENTERPRISE, March/April 1992, at 16, 17 (Editor's Report) (welfare condones complacency and passiveness and robs individuals of dignity and self-respect).

195. Some have ascribed the resurgence of welfare cuts to the recent recession. See, e.g., Kosterlitz, *supra* note 159, at 271 (recession-racked states conducting experiments to make poor behave more responsibly); *The New Welfare Debate*, *supra* note 194, at 16 (economic conditions explain current welfare reform). Interestingly, however, the Wisconsin durational residence requirement was proposed at a time when the state economy was booming: Unemployment was the lowest it had been in 15 years, there was an influx of light industry, and the AFDC case load was on the decline. See Sectar, *supra* note 159, at A1.

However, like the welfare magnet theory, the isolated fact of a recession is both too simple an explanation and too difficult a theory to analyze in a statistical sense. Instead, the need to tighten the budgetary belt, the general public dissatisfaction with the welfare system, the myth of the state as a "welfare magnet," the historically low value placed on transient indigents, and the political ease of continuing disenfranchisement of this group better explains the resurgence of durational residency requirements. Also, the fact that the Court today is perceived as more conservative seems to have encouraged the revival of durational residence requirements. See Baker et al., *supra* note 26, at 23 (Wisconsin governor believes durational residence requirements will be upheld because Court more conservative).

IV. ANALYSIS

This part first classifies the various possible alternative durational residence requirements into four types based on the way they compare to the statutes at issue in *Shapiro*.¹⁹⁶ This part then analyzes each type to determine whether they constitute a penalty on the right to travel.¹⁹⁷ In so doing, this part considers the recent cases that have addressed new durational residence requirements. Finally, this part addresses the application of rational basis review in the event strict scrutiny does not apply.¹⁹⁸

A. Types

For ease of classification and analysis, the current state durational residence requirement statutes can be divided into four separate types, based on the way they compare to the statutes at issue in *Shapiro*.¹⁹⁹ These statutes have two variables: (1) the length of the waiting period (the "time variable"); and (2) the amount of the deprivation (the "level variable"). For example, the statutes in *Shapiro* had no aid (level variable) for one year (time variable). The types outlined below are based on the way the different states have manipulated these variables in order to avoid strict scrutiny.

1. Type I

Type I includes statutes that exactly mirror those in *Shapiro*. Such statutes do not reduce either the time variable or the level variable. They deny all welfare aid to new residents for one year. In 1988 Indiana revived a statute of this type.²⁰⁰ This type also includes statutes that are more severe than those in *Shapiro*, such as those that have waiting periods longer than one year.

196. See *infra* part IV.A.

197. See *infra* part IV.B.

198. See *infra* part IV.C.

199. This classification system is used because, though the current Court might have upheld the statutes in *Shapiro* if presented with them today, most states are trying to distinguish their new statutes from those at issue in *Shapiro*. Thus, this Author has simply adopted the benchmark that the states themselves have seemingly chosen—*Shapiro*. The game the states are playing is not "Will the new Court overrule *Shapiro*?" but instead, "Is my statute different enough from *Shapiro* to avoid strict scrutiny?"

200. IND. CODE ANN. § 12-2-1-5(a) (Burns 1988). This statute was declared unconstitutional in 1989. See *Eddleman v. Center Township*, 723 F. Supp. 85 (S.D. Ind. 1989); *infra* part IV.B.1.

2. Type II

Type II includes statutes that shorten the time variable but do not alter the level variable. In other words, these statutes have a waiting period of less than one year but still mandate total denial of benefits during that period. In 1987 Wisconsin enacted a statute of this type.²⁰¹

3. Type III

Type III includes statutes that lessen the level variable but do not change the time variable from those at issue in *Shapiro*. These statutes, in short, maintain the one-year waiting period, but provide some—though less than all—of the benefits to new residents during that year. Type III has two subsets: (1) type IIIA, which provides that all new residents receive a fixed dollar or percentage amount that is less than the amount received by other residents; and (2) type IIIB, which provides that new residents receive various reduced levels of aid, usually based on the level of aid the individual received in his or her previous state. Thus, type IIIB results in new residents receiving levels of aid that differ from the amount of aid received by both older residents and other new residents from different states. Illinois is presently attempting to enact a type IIIA statute.²⁰² California has enacted a type IIIB statute,²⁰³ and Wyoming is attempting to do so as well.²⁰⁴

4. Type IV

Type IV includes those statutes that both shorten the time variable and reduce the level variable. This type also has two subsets that correspond to those for type III: (1) type IVA, which has both a shorter waiting period and provides some benefit, but that reduced benefit level is equal for all new residents; and (2) type IVB, which also has a shorter waiting period and provides some benefit, but that reduced benefit is not necessarily equal between all new residents, since, as in type IIIB, the new reduced level of aid is fixed usually by the amount of aid received by the individual in his or her previous state of residence. This category is the most problematic because both variables are being altered. Seemingly, this is the path states should choose if they want their statutes to

201. WIS. STAT. ANN. § 49.015 (West 1987). This statute was upheld as constitutional in 1992. See *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992); *infra* part IV.B.2.

202. Wiseman, *supra* note 14, at 23.

203. CAL. WELF. & INST. CODE § 11450.03 (West Supp. 1993). This statute was declared unconstitutional in 1993. *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993); *infra* part IV.B.3.

204. See Wiseman, *supra* note 14, at 25.

differ as much as possible from those at issue in *Shapiro*. However, this may still not guarantee rational basis review. Minnesota has enacted a type IVA statute.²⁰⁵

B. Strict Scrutiny Analysis

Though *Shapiro* itself did not illuminate why strict scrutiny was triggered, subsequent cases defined the parameters of the test.²⁰⁶ The Court in *Memorial Hospital v. Maricopa County*²⁰⁷ focused on the "severity of the deprivation."²⁰⁸ Unlike restrictions on divorce²⁰⁹ or even civil service preferences,²¹⁰ virtually any denial of welfare funds will work a severe hardship upon the new resident. The question remains, however, whether this hardship constitutes a "penalty," and thus triggers strict scrutiny. It is this "severity of the deprivation" prong that determines when strict scrutiny applies,²¹¹ and it is that prong that guides this analysis.

1. Type I

Type I statutes mirror those at issue in *Shapiro*.²¹² Because of their close factual similarity to *Shapiro*, stare decisis demands that such statutes be subject to strict scrutiny. But, stare decisis aside, independent

205. MINN. STAT. § 256D.065 (Supp. 1991). This statute has since been declared unconstitutional. See *Mitchell v. Steffen*, 487 N.W.2d 896 (Minn. Ct. App. 1992); *infra* part IV.B.4.

206. See *supra* part II.C.

207. 415 U.S. 250 (1974).

208. See *supra* part II.C.3.

209. See *supra* part II.C.4.

210. See *supra* part II.C.6.

211. The severity of the deprivation analysis must be done regardless of the basis of the right to travel analysis—unless one uses *Zobel's* "rational basis first" method. See *supra* part II.C.5. Even if Justice O'Connor's Privileges and Immunities analysis is adopted, see *supra* notes 133-36 and accompanying text, presumably there would be some point at which the burden on the right to travel would be so small as to not trigger heightened scrutiny. Thus, the penalty must be analyzed.

However, some commentators find the penalty analysis simply an "illusion of a principled judicial framework," and would discard it. See Note, *Durational Residence Requirements from Shapiro Through Sosna: The Right to Travel Takes a New Turn*, 50 N.Y.U. L. REV. 622, 669 (1975). Others find penalty analysis difficult to conduct and propose a bright-line test: Durational residence requirements for state benefits are only permissible to the extent they prove domiciliary intent; all other uses of durational residence requirements for state benefits are unconstitutional. See William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 CONST. COMMENTARY 9, 19 (1984). Nevertheless, the penalty analysis has been applied continuously since its inception in *Shapiro*. See *supra* parts II.B-C. This Comment follows that tradition and assumes that penalty analysis within the Equal Protection Clause is the proper framework to test the validity of current durational residence requirements.

212. See *supra* part IV.A.1.

analysis also requires that type I statutes be subject to strict scrutiny. As in *Shapiro* and *Memorial Hospital*, the deprivation suffered by the new resident under a type I statute is total—there is no aid for a set period. Also, as in those cases, the utility of the benefit denied is substantial.²¹³ Being deprived of all ability to afford the basic necessities of life is a severe deprivation. In terms of dollar amount, type I statutes tend to work the most severe deprivation,²¹⁴ because by definition no other type denies as much aid for as long. Thus, independent analysis confirms what stare decisis commands—type I statutes trigger strict scrutiny because they penalize the right to travel.

In *Eddleman v. Center Township of Marion County*,²¹⁵ the United States District Court for the Southern District of Indiana addressed the constitutionality of a type I statute. The statute at issue conditioned receipt of township "poor relief" on three years of continuous residence within the state and one year of continuous residence within the county.²¹⁶ Following *Shapiro* the District Court found the Indiana durational residence requirement to be facially unconstitutional under the Equal Protection Clause of the Fourteenth Amendment,²¹⁷ and enjoined the township from enforcing its provisions.²¹⁸

The court, however, was not required to test the outer boundaries of when strict scrutiny should apply because of the factual similarity to *Shapiro*. Though the court laid out the constitutional test,²¹⁹ both par-

213. See *Memorial Hosp.*, 415 U.S. at 259-61 (finding governmental privileges or benefits necessary to basic sustenance have greater constitutional significance); *Shapiro*, 394 U.S. at 627 (stressing importance of necessities of life).

214. For example, person *A* lives in state *Y*, which provides \$750 per month in state aid. Person *A* then moves to state *X*, which provides \$1000 per month in state aid, but also has a durational residence requirement. For each type of durational residence requirement, the deprivation in dollar amounts, based on the listed terms of the statute, would be as follows:

Type	Terms	Old Resident	New Resident	Deprivation
I	1 year, no aid	\$12,000	\$0	\$12,000
II	6 mos., no aid	\$12,000	\$6000	\$6000
IIIA	1 year, 60% aid	\$12,000	\$7200	\$4800
IIIB	1 year, old aid	\$12,000	\$9000	\$3000
IVA	6 mos., 60% aid	\$12,000	\$9600	\$2400
IVB	6 mos., old aid	\$12,000	\$10,500	\$1500

215. 723 F. Supp. 85 (S.D. Ind. 1989).

216. See *id.* at 86 (citing IND. CODE ANN. § 12-2-1-5(a) (Burns 1988)).

217. The court applied strict scrutiny, relying on the conclusion in *Shapiro* that "any classification which serves to penalize the exercise of [the constitutional right to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Id.* at 88 (citing *Shapiro*, 394 U.S. at 634).

218. *Id.* at 90.

219. The court stated:

Whenever testing the constitutionality of a state statute under the equal protection clause, courts analyze three factors concerning the law: the classes established by the

ties "agreed that [the statute] must be subject to strict scrutiny and that it fails this test,"²²⁰ presumably because the state offered no compelling interest.²²¹

The court, noting that the controlling case law was "old and well-established,"²²² found that the requirement penalized the exercise of the fundamental right to travel. The court held that the statute on its face "groups poor relief applicants into two classes based only on whether the applicant has recently travelled interstate. *Shapiro v. Thompson* . . . clearly mandates that this clause be struck down as unconstitutional."²²³

Though the court in *Eddleman* failed to do a complete "severity of the deprivation" analysis, it reached the proper result by relying on stare decisis. Strict scrutiny was triggered and the statute failed to pass muster. Thus, under either a full-fledged *Memorial Hospital* analysis, or by reliance on stare decisis, type I statutes must be subject to strict scrutiny, and, as is well settled by *Shapiro*, must fail that test.

2. Type II

States enacting type II durational residence requirements have tried to avoid strict scrutiny by shortening the length of time that new residents are deprived of welfare aid.²²⁴ Taking what is seemingly a logical step, these states have gambled that shortening the length of the waiting period will sufficiently reduce the severity of the deprivation so that they no longer penalize the right to travel.

Proponents of type II statutes argue that reducing the length of the deprivation removes a durational residence requirement from the realm of strict scrutiny.²²⁵ They argue that because the Court in *Shapiro* did

law, the interests of the persons affected by the classification, and the importance of the governmental interest the statute was intended to further. . . . Statutes that classify persons on the basis of inherently suspect criteria . . . and statutes that infringe on the exercise of a fundamental right are subjected to a higher level of judicial scrutiny—"strict scrutiny."

Id. at 87.

220. *Id.*

221. *Id.* at 90. In fact, the state of Indiana withdrew its appearance from the case, stating that it "has no legal interest," further indicating that "there is indeed no compelling governmental interest furthered by the statute." *Id.* at 90 n.11.

222. *Id.* at 87.

223. *Id.* at 89 n.8. Interestingly, this is the second time that *Shapiro* has been used to invalidate this particular Indiana statute. In 1970, following the *Shapiro* decision, a three-judge panel of the district court in *Major v. Van DeWalle*, No. 4169 (N.D. Ind. Mar. 2, 1970), permanently enjoined the Portage Township trustee from enforcing the statute. *Eddleman*, 723 F. Supp. at 88.

224. See *supra* part IV.A.2.

225. See, e.g., *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992).

not hold all residence requirements unconstitutional per se,²²⁶ it impliedly endorsed some durational residence requirements. This position has several problems.

First, the language in footnote twenty-one of *Shapiro* does not support this type of analysis. The problematic footnote states:

We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.²²⁷

This footnote does not state that different types of deprivations of welfare aid may not be a penalty on the right to travel. Instead, the footnote distinguishes residence requirements for welfare from residence requirements for other benefits provided from the state. Thus, *Shapiro* itself provides no direct indication that a shorter duration would change the analysis in any significant way. Of course, this understanding does not mean that a shorter period cannot avoid strict scrutiny, but simply that *Shapiro* itself does not provide such an argument; any references to the *Shapiro* decision in this way are inaccurate.

Also, comparisons to *Shapiro* in this regard are problematic, doing no more than begging the very question they attempt to answer. Saying that a shorter waiting period is less onerous than those at issue in *Shapiro* is misleading. Such reasoning presumes that *Shapiro* is in some way an outside measurement: that the one-year statutes in *Shapiro* mark the outside boundary of acceptability.²²⁸ Thus, simple comparisons to the length of the waiting period alone do not distinguish type II statutes from

226. *Shapiro*, 394 U.S. at 638 n.21.

227. *Id.*

228. To understand the flaw in this reasoning, consider the following example: Assume that river *X* has a pollution level of 365 particles per thousand, rendering the river dangerous. After clean up efforts, the pollution level is reduced to 60 parts per thousand. Certainly this is a large reduction. However, stating that the river is now clean enough as to no longer be dangerous is to presume something we do not know: What is the maximum tolerable level of pollution? Stating simply that the river is now less filthy does not necessarily make it clean. If the maximum acceptable level of pollution is 20 parts per thousand (or even zero parts per thousand), then the reduction from 365 to 60—while a reduction of over 80%—does not make the contaminated river uncontaminated.

So too with *Shapiro*. *Shapiro* simply says, to continue the analogy, that the river is polluted. It does not say how polluted. It gives no indication how much of a reduction—if any—will make the river clean.

the *Shapiro* statutes in a meaningful way, and certainly do not warrant avoiding strict scrutiny.

The question is not how much less burdensome type II statutes are as compared to those in *Shapiro*, but whether the remaining burden constitutes an impermissible penalty. In *Shapiro* the Court asked if the statutes at issue burdened the right to travel. That same question must be asked again, and simple comparison to the statutes in *Shapiro* does not provide an answer.

Instead, the focus must be on that which is denied.²²⁹ Certainly, type II statutes lessen the burden on new residents if that burden is measured purely in total dollars denied or in total time without the entitlement. Take for example a hypothetical new resident *A* of state *X*. Assume state *X* pays \$1000 per month in welfare aid. Under a *Shapiro*-type statute, *A* would be denied \$12,000 of welfare aid. Under a type II statute, such as the sixty-day residence requirement of Wisconsin,²³⁰ new resident *A* would be denied \$2000 of aid. Though less, this does not answer whether or not the existing deprivation constitutes an undue burden on the right to travel.

Further, focusing strictly on the dollar amount of the deprivation is not a proper measuring stick. The importance of each of these dollars is almost impossible to measure.²³¹ In the example above, the fact that new resident *A* is deprived of \$10,000 less under a type II statute does not change the fact that for two months he or she cannot afford the basic

229. Some argue that welfare is a privilege not a right, and is provided gratuitously by the state. Since the state does not have to provide welfare, the argument runs, it can deny it where and when it so desires. See, e.g., Thomas R. McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or “Newcomers” as a Suspect Class?*, 28 VAND. L. REV. 987, 996-99 (1975) (“[F]ailing to offer benefits that would make the state a more attractive place does not in any ordinary sense constitute penalizing those who travel [or] inhibiting [those who do not].”). This type of “rights-privileges” distinction, however, is no longer valid constitutional doctrine, having given way to the “unconstitutional conditions” doctrine. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540 (1984) (holding that certain rights cannot be deprived except pursuant to constitutionally adequate procedures, and that “bitter with the sweet” approach misconceives constitutional guarantees); see *TRIBE*, *supra* note 47, § 10-8, at 680-82; see also *Zobel v. Williams*, 457 U.S. 55, 60 (1982); *supra* part II.C.5. However, the continued validity of the unconstitutional conditions doctrine is in doubt. See *TRIBE*, *supra* note 42, § 10-8, at 681 n.29.

230. See *infra* notes 232-47 and accompanying text discussing *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992).

231. For example, in California the combined AFDC and food stamp grant equals only 94% of the poverty line. *WALD*, *supra* note 167, at 8. In fact, members of the House Committee on Ways and Means concluded that people with incomes at the poverty line often do not have enough money for basic survival. *Id.* at 9. Thus, even incremental reductions from a grant level that is set below the poverty line will be very serious, greatly magnifying the utility of each of these dollars to the recipient.

necessities of life. Being denied the funds necessary to meet the bare necessities of life for even a relatively short time can have significant impact, and thus impose a burden on the right to travel. Thus, it is the qualitative impact of the deprivation, not the simple manipulation of the time element alone, that is dispositive. Because of the severity of total denial of welfare funds, reducing the length of that deprivation merely reduces the level of the deprivation from unconscionable to unconstitutional.

The Wisconsin Supreme Court recently considered a type II statute in *Jones v. Milwaukee County*.²³² The challenged statute denied all general assistance benefits to new residents for the first sixty days of their residency.²³³ The Wisconsin circuit court ruled the statute unconstitutional,²³⁴ but the state supreme court reversed.²³⁵ Though the Wisconsin Supreme Court very acutely identified the core problem of the *Shapiro* analysis,²³⁶ the court, in a very brief passage, held that "the 60 day waiting period at issue here is so substantially less onerous than the one-year waiting period of *Shapiro*, that it does not operate to penalize an individual's right to travel."²³⁷ This bald statement was the entirety of the court's reasoning behind not applying strict scrutiny.²³⁸ As explained above, however, this simple comparison of the length of the waiting peri-

232. 485 N.W.2d 21 (Wis. 1992).

233. WIS. STAT. ANN. § 49.015 (West 1987). The statute does allow for several exceptions, such as medical emergency or extraordinary hardship, coming to join a close relative, coming to accept a bona fide job offer, or having in the past resided in the state for one year. *Id.*

234. See *Jones*, 485 N.W.2d at 22.

235. *Id.*

236. The court noted:

The threshold question is whether the 60 day waiting period penalizes an individual's right to travel such that it must be shown that the waiting period promotes a "compelling" state interest under the strict scrutiny standard. . . . "Although any durational residence requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such a requirement to be per se unconstitutional. . . . The amount of impact required to give rise to the compelling-state-interest test was not made clear."

Id. at 25 (quoting *Memorial Hosp.*, 415 U.S. at 256-57). The court, however, was very aware of its entrance into uncharted waters. See *id.* at 26; *infra* note 248.

237. *Jones*, 485 N.W.2d at 26. Unfortunately, this comparison of *Shapiro* is flawed. The court treated *Shapiro*'s one-year requirement as some type of minimum requirement for triggering strict scrutiny. The court performed no analysis of the severity of the penalty, or its impact on the individual deprived, nor did it address whether the deprived individual has been irretrievably foreclosed from obtaining the benefit. Also, the majority ignored the language in *Soto-Lopez*, see discussion *supra* note 141 and accompanying text, that even temporary deprivations of significant benefits may impose an impermissible burden on the right to travel. The court merely relied on the qualitative difference between 60 days and one year, performing no analysis within the *Soto-Lopez/Memorial Hospital* framework. See *supra* note 228 and accompanying text for a deeper criticism of the problems with this type of analysis.

238. See *Jones*, 485 N.W.2d at 25-26.

ods, without more, does not sufficiently distinguish this statute from *Shapiro* so as to avoid strict scrutiny.

The court in *Jones* then applied rational basis review, holding the statute constitutional under the proposed justification of encouraging employment.²³⁹ Though the court noted that this may not have been the best or wisest solution, it stated that it was not for the court "to pass judgment as to the wisdom of the legislature."²⁴⁰

Chief Justice Heffernan's dissent in *Jones* provided more detailed analysis. Taking the majority to task for using *Shapiro*'s language that not all waiting periods are penalties on the right to travel,²⁴¹ the Chief Justice correctly noted that "[n]othing in *Shapiro* indicates that the length of the residence requirement measured impact on the right of interstate travel. Rather, it is the nature of the right or interest impinged."²⁴² Chief Justice Heffernan conceded that, even if length of the requirement was a relevant factor, because the statute "was intended to deter migration,"²⁴³ it thus deserved strict scrutiny,²⁴⁴ under which, following the reasoning in *Shapiro*, it must fail.²⁴⁵ The Chief Justice found that the sixty-day waiting period was in fact a penalty on the right to travel, stating that "sixty days without food and shelter is no less devastating than one year without food and shelter."²⁴⁶ The dissent noted that though "Wisconsin's need to avoid being a 'welfare-magnet' may well be significant, . . . it is insignificant in a constitutional analysis under precedents we are obliged to follow."²⁴⁷

The *Jones* decision is a poor addition to the jurisprudence of the right to travel. While the court decided that a sixty-day waiting period does not trigger strict scrutiny, it was lax in not spelling out its reason-

239. *Id.* at 26-27.

240. *Id.* at 27.

241. *Shapiro*, 394 U.S. at 638 n.21.

242. *Jones*, 485 N.W.2d at 28 (Heffernan, C.J., dissenting). Also, see the discussion of this very point at *supra* notes 225-28 and accompanying text.

243. *Jones*, 485 N.W.2d at 29 (Heffernan, C.J., dissenting).

244. *Id.* (Heffernan, C.J., dissenting).

245. *Id.* at 29-30 (Heffernan, C.J., dissenting).

246. *Id.* at 30 (Heffernan, C.J., dissenting). Quoting the lower court, Heffernan stated:

The issue is not whether 60 days is a reasonable time period, but whether such a delay in the provision of aid to which the applicant is otherwise entitled constitutes a penalty on the right to travel. . . . These basic necessities of life are viewed with greater constitutional significance, and the withholding of such assistance constitutes a penalty on the plaintiff's right to travel.

Id. at 29-30 (Heffernan, C.J., dissenting). The chief justice relied on the reasoning in *Memorial Hospital* that even temporary deprivations of necessities of life impose a penalty on the right to travel. *Id.* (citing *Memorial Hosp.*, 415 U.S. at 29).

247. *Id.* at 30-31 (Heffernan, C.J., dissenting). See *supra* notes 169-74 for a discussion of the "welfare magnet" theory.

ing.²⁴⁸ Moreover, the majority failed to consider the *Memorial Hospital* element of the right to travel analysis, and thus left unanswered the question of what triggers strict scrutiny.²⁴⁹

3. Type III

States enacting durational residence requirements of this type have attempted to avoid strict scrutiny by providing some level of aid to new residents without shortening the time of the deprivation from the statutes at issue in *Shapiro*.²⁵⁰ Presumably, states adopted this approach hoping that by providing some aid their statutes will not serve to impermissibly burden the right to travel. This approach, too, is flawed.

Both type IIIA and IIIB provide new residents with less than the amount of aid given to older residents. Both type IIIA and IIIB suffer from the same problem as type II: Strictly focusing on the dollar value of the deprivation is misleading.²⁵¹ Consider once again the hypothetical new resident *A*. Under a type IIIA statute providing sixty-percent benefits to new residents for their first year in state *X*, which provides \$1000 per month, new resident *A* would be deprived of \$4800.²⁵² Under a type IIIB statute providing benefits at the level of new resident *A*'s previous state—assume *A* came from a state that provided \$750 per month in aid—*A* would be deprived of \$3000.²⁵³ These new statutes are certainly “less burdensome” than a *Shapiro*-type statute, which would deny *A* the full \$12,000, in that at least *A* is not totally deprived of welfare aid. But, as with type II statutes, the question remains: Is the current deprivation a penalty? The simple fact that a new statute takes fewer dollars away from a new resident does not in and of itself dictate that the new statute is not an impermissible burden on the right to travel.

248. The court in *Jones* essentially threw up its hands in frustration and gave up on trying to figure out the parameters of the admittedly confusing *Shapiro* analysis. The majority noted “that the Supreme Court itself recognizes the unsettled nature of the amount of impact necessary to give rise to the [strict scrutiny] standard, and that the parameters of *Shapiro*'s penalty analysis admittedly remain undefined.” *Jones*, 485 N.W.2d at 26. After this disclaimer, the court baldly stated that the waiting period was constitutional. *Id.*

249. The majority in *Jones* did not address this issue. It simply noted that *Memorial Hospital* did not make the test clear and proceeded to ignore the “severity of the deprivation” analysis. *Id.* at 25-26.

250. See *supra* part IV.A.3.

251. See *supra* note 231 and accompanying text for a discussion of this problem.

252. Twelve thousand dollars per year to which older residents are entitled minus 12 months at \$600 per month which *A* receives.

253. Twelve thousand dollars per year to which older residents are entitled minus 12 months at \$750 per month for *A*.

Again, the problem of dollar utility arises. As with type II statutes, the value of each dollar that *A* receives below that which is necessary to provide for the basic necessities of life is increased.²⁵⁴ If *A* is one dollar short of paying rent, *A* has no shelter. If *A* is one dollar short of being able to purchase food for his or her children, they go hungry. Already, welfare in most states does not even provide poverty level income.²⁵⁵ Thus, reducing this entitlement any further works a severe burden on the new resident—a burden that penalizes the right to travel. Thus, providing sixty percent of the necessities of life should prove as futile as total deprivations limited to a short period of time. As with other durational residence requirements, type III statutes should continue to trigger strict scrutiny.

California has recently enacted a type IIIB statute.²⁵⁶ The California statute limits new residents to the level of aid they received in their old state for their first twelve months of California residency.²⁵⁷ The district court recently addressed the California statute in *Green v. Anderson*²⁵⁸ and found it unconstitutional.²⁵⁹

The district court in *Green* found that the California durational residency requirement²⁶⁰ constituted a penalty on migration.²⁶¹ The court stated that “[a]lthough the [statute] does not eliminate all AFDC benefits, it produces substantial disparities in benefit levels and makes no accommodation for the different costs of living that exist in different states.”²⁶² The court noted that simply providing some aid will not necessarily save the statute from strict scrutiny.²⁶³

The court also stressed that the relevant comparison is not between recent residents of California and residents of other states, but between bona fide California residents.²⁶⁴ The fact that a new resident does not receive a dollar reduction in payments, the court stated, is not rele-

254. See *supra* note 231 and accompanying text.

255. See *supra* note 231.

256. CAL. WELF. & INST. CODE § 11450.03 (West Supp. 1993).

257. The statute provides: “Families that have resided in this state for less than 12 months shall be paid an amount . . . not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.” *Id.*

258. 811 F. Supp. 516 (E.D. Cal. 1993).

259. *Id.* at 523.

260. CAL. WELF. & INST. CODE § 11450.03.

261. *Green*, 811 F. Supp. at 521.

262. *Id.*

263. The court noted that “[i]n *Memorial Hospital* the measure was not saved because it pertained to some but not all medical services, so, too, this measure is not constitutional because it materially diminishes, without entirely eliminating, AFDC benefits.” *Id.*

264. *Id.* The court stated that had the comparison been between recent residents and residents of other states:

vant.²⁶⁵ The statute penalizes migration because it treats recent residents differently than other California residents.²⁶⁶ Moreover, in addressing the differences in cost of living,²⁶⁷ the court stated that the statute "cannot fairly be said to provide the same payment as new residents could have received in the state of their prior residence."²⁶⁸

Finding strict scrutiny triggered, the court turned to the proffered state interests and found them lacking.²⁶⁹ The court found the statute sensibly designed if its goal was to deter migration,²⁷⁰ but, following *Shapiro*, stated that such a purpose was unconstitutional.²⁷¹ Addressing the goal of saving costs, the court found unpersuasive any argument that new residents, constituting 6.6% of the state's AFDC caseload,²⁷² are better able to bear a reduction in benefits than other residents.²⁷³ The court noted finally that, "[s]tripped of the unconstitutional purpose of deterring migration, the measure lacks a rational design."²⁷⁴

Thus, type III statutes, in particular type IIIB statutes, which create even more groupings of residents, should trigger strict scrutiny. Though these statutes do not totally deny aid, under *Memorial Hospital*,²⁷⁵ partial or temporary denial of necessities of life—which certainly includes welfare aid—may penalize the right to travel and thus trigger strict scru-

[T]he result in *Zobel* would be inexplicable since no other state provided a bounty to its citizens and thus Alaska treated new residents better in this respect than residents of other states. Similarly, it was of significance in *Memorial Hospital* that the non-emergency care provided by Maricopa County may have been much superior to the medical care provided elsewhere.

Id.

265. *Id.*

266. *Id.*

267. *Id.* at 521 n.13.

268. *Id.* at 521. Thus, the court highlighted a common problem underlying enactment of durational residence requirements—simple-minded focus on strict dollar amount of payments. See *supra* part III.B for the impact of this problem on the welfare magnet theory.

269. *Green*, 811 F. Supp. at 522.

270. *Id.* The court also noted that there is evidence that this was the true goal of the statute. See *id.* at 522 n.14.

271. *Id.* at 522.

272. *Id.* at 518 n.4.

273. *Id.* at 522.

274. *Id.* The court indicated that the statute could possibly have failed even rational basis review when it advised the state that it "may seek to conserve resources by reducing welfare benefits to all recipients or to some recipients on some rational, non-discriminatory basis. But unless the purpose here is to deter migration, there is no other rational basis for the distinction drawn among applicants all of whom are California residents." *Id.* at 523. See *infra* part IV.C.3 for a discussion of rational basis review of these statutes.

275. See *supra* part II.C.

tiny. Type III statutes, where the time period is still one year, as in *Memorial Hospital*,²⁷⁶ should also trigger strict scrutiny review.

4. Type IV

Type IV statutes both shorten the duration of the denial and give some percentage of aid during that shortened period.²⁷⁷ Though this type may seem the most likely to avoid strict scrutiny, it nevertheless encounters the same problems of types II and III. As discussed above, the time of the deprivation should not be significant in determining the penalty when that deprivation is total.²⁷⁸ Also, providing part of the aid still fails to provide the basic necessities and thus is a penalty.²⁷⁹ Simply combining these two variables should not solve the problem that they could not solve alone.

Type IV offers the attractiveness of a potential solution. This type significantly reduces the comparative dollar amount of the deprivation from *Shapiro*.²⁸⁰ Again considering hypothetical new resident *A*, in a state that has a type IVA statute providing sixty percent of the state aid for the first sixty days, *A* would be deprived of only \$800.²⁸¹ Compared to the denial of \$12,000 under a *Shapiro*-type statute, or \$2000 under our hypothetical type I, or \$4800 under our hypothetical type IIIA, this is certainly less of a strict balance-sheet burden.

However, for two months, *A* is still deprived of the necessities of life. Though the state may come close to meeting them, they are not met. Again, two-thirds of the cost of rent still deprives the individual of shelter. This is an impermissible burden. Strict scrutiny should be triggered by such a statute. Of course, type IVB brings with it the additional problem of type IIIB discussed above.²⁸²

The Minnesota statute held unconstitutional by the state court of appeals in *Mitchell v. Steffen*²⁸³ is an example of a type IVA statute.²⁸⁴ That statute provided that all new residents who have resided in Minne-

276. See *supra* part II.C.

277. See *supra* part IV.A.4.

278. See *supra* part IV.B.2.

279. See *supra* part IV.B.3.

280. See *supra* note 214.

281. Twelve thousand dollars per year for old residents minus two months at \$600 plus 10 months at full benefits.

282. See *supra* part IV.B.3.

283. 487 N.W.2d 896 (Minn. Ct. App. 1992).

284. See *id.*

sota less than six months receive sixty percent of the aid given to older residents.²⁸⁵

Mitchell involved the constitutionality of a recently amended statute that provided that an applicant for state aid without minor children who has resided within the state less than six months receives sixty percent of the amount available to other residents of longer duration.²⁸⁶ The statute also provided that if the applicant received aid in his or her previous state of residence, he or she is entitled to only the lesser of either the benefit level of the applicant's former state or the normal Minnesota benefits.²⁸⁷ The Minnesota Court of Appeals found that the legislative debate on these amendments "focused on the concern of legislators that people move to Minnesota in order to collect higher public assistance benefits."²⁸⁸

In upholding the lower court's grant of summary judgment against the statute, the court in *Mitchell* applied classic *Shapiro* reasoning. Citing the test summarized in *Soto-Lopez*, the court found that the statute on its face discriminated between residents²⁸⁹ and that the right to travel had been burdened.²⁹⁰ The court, citing *Memorial Hospital*, rejected the state's claim that actual proof of deterrence was required.²⁹¹ In addition, relying on the legislative history of the amendment, the court found the legislature's intent to deter migration constitutionally impermissible, as in *Shapiro*.²⁹² Also, the court used a practical determination to judge if the deprivation of the benefit constituted a penalty. The court found that the reduced benefits were "insufficient to provide for the basic necessities of life."²⁹³ The court also rejected as impermissible the other state justifi-

285. MINN. STAT. § 256D.065 (Supp. 1991).

286. *Mitchell*, 487 N.W.2d at 899 (referring to MINN. STAT. § 256D.065). This is a variation of a type IVA residence requirement. See *supra* part IV.A.3.

287. *Mitchell*, 487 N.W.2d at 899 (referring to MINN. STAT. § 256D.065). This is a variation of a type IVB residence requirement. See *supra* part IV.A.4.

288. *Mitchell*, 487 N.W.2d at 900. See *supra* part III.A for a review of the misperceptions that cause this type of legislation.

289. *Mitchell*, 487 N.W.2d at 901.

290. *Id.* at 902.

291. *Id.*

292. *Id.*

293. *Id.* The court, following *Memorial Hospital*, noted that "[t]he fact that the statute reduces, rather than eliminates, benefits does not change the conclusion that it is an unconstitutional penalty on the right to travel." *Id.* It further noted that "where a residency requirement involves governmental privileges or benefits necessary to basic sustenance, even temporary deprivations or reductions tend to be severe and work serious inequities among otherwise qualified residents." *Id.* at 902-03.

Though no writing prior to this Comment has reviewed this approach, it is a safe guess that it will come under criticism, because it is normally the province of the legislature to

cations of protecting the public fisc and making "receipt of public assistance benefits a neutral factor in an individual's decision to move to the state."²⁹⁴

The court, in dicta, went further. The court reasoned that even if the objectives had been permissible, they would have failed the "narrowly tailored" requirement.²⁹⁵ Because a Minnesota study found that only 6.4% of new public assistance recipients moved to Minnesota because of higher benefit levels, the statute was overbroad in that it reduced the benefits of all new residents.²⁹⁶ The court also noted that even if not overbroad, there were other methods of achieving the desired goals, which not only were more efficient but were less burdensome on the right to travel.²⁹⁷

C. *Rational Basis Analysis*

States will be disappointed even if they are successful in skirting strict scrutiny, since the new state durational residence requirements must still pass rational basis review.²⁹⁸ That may not prove to be as easy as the states are assuming. Though normally a very deferential standard, this test, particularly in the right to travel area, still retains some teeth.²⁹⁹ In the right to travel area, none of the governmental interests advanced in support of durational residence requirements have been found to be

determine what constitutes the "basic necessities of life," and the cost of supporting those necessities.

294. *Id.* at 903.

295. *Id.*

296. *Id.* Both the Minnesota legislature and courts had access to a local study done concerning indigency, migration, and welfare. See MINNESOTA DEP'T OF HUMAN SERVS., WELFARE MIGRATION STUDY: A REPORT TO THE 1991 LEGISLATURE (1991). See *supra* part III.A for a discussion of the statistics and data that underlie public policy making in the area of welfare.

297. *Mitchell*, 487 N.W.2d at 905. Further, the court noted that the Privileges and Immunities Clause of Article IV was not implicated because the discrimination was between classes of residents, not between residents and nonresidents. *Id.* The court thus effectively rejected Justice O'Connor's opinions in *Zobel* and *Soto-Lopez*. See *supra* parts II.C.5-6 for a discussion of Justice O'Connor's position.

298. To pass rational basis review, the critical inquiry is whether a rational legislature could believe a legitimate governmental goal is being served. See *TRIBE*, *supra* note 47, § 16-2; see also *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-44 (1973).

299. See *Zobel v. Williams*, 457 U.S. 55 (1982). See *supra* part II.C for a discussion of *Zobel*.

legitimate, except for the interest in promoting employment.³⁰⁰ However, even that interest is unlikely to save these statutes because of their inherent irrationality.³⁰¹ Thus, the new state durational residence requirements should fail even rational basis review.

1. Type I

Type I statutes should fail rational basis review for several reasons. First, since the underlying principles that lead to the adoption of durational residence requirements for the receipt of welfare aid are not based on reason—but instead on erroneous stereotypes—by definition no *rational* legislature could believe it was serving a legitimate governmental goal by legislating based on these stereotypes. Also, if the goal is encouraging employment, then a durational residence requirement makes little sense. New residents usually constitute a statistically small percentage of indigents.³⁰² There is no rational reason why this group specifically should be targeted and “encouraged” to find employment while the rest of the indigent individuals in the state are not.³⁰³

These statutes do not show an intent to encourage employment—since a more contrary means of reaching that goal could hardly be imagined—but instead show a desire to keep the poor from exercising their constitutional rights. For these reasons, type I statutes should fail even rational basis review.

2. Type II

Even if the *Jones* court correctly determined that the length of the deprivation can be reduced enough to avoid strict scrutiny,³⁰⁴ type II statutes have an additional problem: The shorter the statute makes the waiting period in an attempt to avoid strict scrutiny, the less rationally related the statute becomes to the goal of encouraging new residents to seek employment. Although perhaps new residents are more motivated to find employment during the waiting period, they need only hold out

300. See *Shapiro*, 394 U.S. at 631-38 (finding governmental interests to be not only not compelling but also not legitimate); *supra* part II.B; see also *Zobel*, 457 U.S. 55 (finding state statute failed even rational basis review). The only legitimate governmental interest appears to be promoting employment. *Jones v. Milwaukee County*, 485 N.W.2d 21, 27 (Wis. 1992).

301. The *Jones* decision, allowing the state interest of encouraging employment to sustain the durational residence requirement at issue in that case, is flawed and should not be emulated. See *supra* notes 232-49 and accompanying text.

302. See *supra* note 178 and accompanying text.

303. See *infra* part IV.C.2 for a more complete discussion of the goal of encouraging employment.

304. See *supra* notes 232-40 and accompanying text.

for a short period of time. After the short waiting period, the new resident has no further "incentive" to find employment for the rest of his or her stay as a resident of the state, and is free to be unemployed. Certainly a state must be more concerned with an individual's long-term employment for the many years of his or her residency, not merely the first year—or even less—of residence.³⁰⁵

The new resident is instead being punished for moving into the state. By not giving a new resident the support he or she needs while looking for a job, the state actually decreases the likelihood that he or she will find one. Rationally, if the state were truly concerned with promoting employment, it would provide a safety net of welfare for a brief time upon arrival, such as six months, so that an individual could seek a job and then would stop giving welfare aid to those who had not found employment. Denying aid at the outset does not rationally further the goal of encouraging employment. Thus, even if a type II statute could theoretically avoid strict scrutiny, it should not be able to pass muster under rational basis review.

3. Type III

Type III statutes will also have problems passing rational basis review. These statutes share the general problems of type I, in that they are aimed at a statistically small group.³⁰⁶ Also, as with type II statutes, the deprivation is at the front end of a citizen's residency, which is not rationally related to encouraging employment.³⁰⁷

Type IIIB statutes, however, have an additional problem. Not only do these statutes already divide similarly situated residents based upon how recently they exercised their right to travel, they also divide similarly situated new residents into groups based on their prior state of resi-

305. In fact, some states have a durational residence requirement and a statute reducing aid for those recipients who remain on AFDC for an extended period of time. This demonstrates further that the real purpose behind these statutes is deterring migration of indigent individuals—an impermissible goal. *See infra* note 307.

306. *See supra* part IV.C.1.

307. *See supra* part IV.C.2. Though California passed its durational residence requirement separately, it was part of a welfare reform package—Proposition 165—that was defeated by state voters. That proposition included—along with the durational residence requirement—a provision reducing aid by 15% to all recipients still receiving aid after six months, which was drafted as an incentive to welfare recipients to obtain employment. If encouraging employment is truly the goal of the durational residence requirement, however, it is hard to understand why the legislature adopted two different means to achieve that goal: For new residents it decided to deny aid at the outset, yet for the welfare population at large, it decided to deny aid only after a period of extended dependency. Thus, unless indigent new residents somehow deserve double incentive to become employed, this demonstrates that deterring migration is actually the goal of the durational residence requirement, not encouraging employment.

dence. California, which has such a statute, would pay different benefit levels to new residents based on their old entitlement.³⁰⁸ California provides \$663 per month to old-resident, three-person families.³⁰⁹ New residents from Texas would receive \$184 per month;³¹⁰ those from Ohio \$334 per month;³¹¹ those from New York \$577 per month;³¹² and those from Alaska, which provides \$924 per month,³¹³ would receive \$397.80 per month because residents from states that give aid in levels greater than the California entitlement receive sixty percent of the California payment.³¹⁴

This division, based on one's prior state of residence, is irrational. It needlessly imposes yet another grouping on similarly situated new residents. Such a scheme is the product of faulty assumptions about the state as a welfare magnet.³¹⁵ The type IIIB scheme is adopted because legislators worry that new residents who move to the state from lower-aid states will receive a windfall.³¹⁶ For example, a Texan who moves to California under a type IIIA plan that gives new residents sixty percent of the state grant goes from receiving \$184 per month to receiving \$397.80 per month. The legislators perceive this as a windfall of \$213.80. Thus, they enact type IIIB statutes to prevent Texas residents from being tempted by this "windfall." This reasoning, however, is irrational. It is not this supposed "gain" that a potential new resident will focus on, but instead the difference between what they will be paid and what it costs to live in the state. The increase is only a gain if the cost of living stays constant between the two states.³¹⁷ Because welfare grants are tied to the poverty level within the state, moving from state to state, regardless of any illusory dollar gain, will keep the individual at approximately the same point in relation to the poverty line.

Thus, the type IIIB solution makes no sense. The cost of living is the same for all new residents in California. However, new residents re-

308. CAL. WELF. & INST. CODE § 11450.03 (West Supp. 1992). See *infra* notes 309-17 and accompanying text. The court in *Green*, though indicating the statute lacked a rational basis, did not make this additional distinction regarding the irrationality of further subdivision of new residence based on prior state residence. See *Green v. Anderson*, 811 F. Supp. 516, 517-23 (E.D. Cal. 1993).

309. WALD, *supra* note 167, app. B at 43.

310. *Id.* at 11.

311. *Id.*

312. *Id.*

313. *Id.*

314. CAL. WELF. & INST. CODE § 11450.03.

315. See *supra* note 159.

316. See *supra* note 159.

317. This observation was made by the district court in *Green*, 811 F. Supp. at 521 n.13, which considered a statute of this type. See *supra* notes 258-74 and accompanying text.

ceiving differing levels of aid are placed at various points on the spectrum of aid based solely on their prior state of residence. This type of statute causes those from states with lower welfare aid to bear an even greater penalty on the right to travel simply because the cost of living was lower in their prior state. Type IIIB statutes, thus, simply prove that encouraging employment is not their true goal; that instead they are aimed at discouraging migration of indigents. Type IIIB statutes are most certain to be subject to strict scrutiny because of the additional inequitable discrimination among new residents, as well as most certain to lack a rational basis to encouraging employment, and thus be found unconstitutional.

4. Type IV

Though the type IVA statute in *Mitchell v. Steffen*³¹⁸ was subjected to strict scrutiny, because statutes of this type usually work the lowest dollar amount deprivation, they seemingly have the greatest chance of avoiding strict scrutiny. However, under rational basis review, statutes of this type share the same problems as types I, II, and III.³¹⁹ Also, type IVB statutes share the same problem as type IIIB—they group new residents into subgroups based on state of prior residence.³²⁰ In fact, type IV best highlights the dilemma states face in adopting the new breed of durational residence requirements: The more they whittle away at the time variable and the level variable in order to avoid strict scrutiny, the more irrational the resulting statute seems, minus the unconstitutional goal of excluding indigents. Thus, even if type IV statutes can avoid strict scrutiny, they should fail rational basis review.

V. CONCLUSION

Some twenty years after *Shapiro*, the courts have again been asked to consider the constitutional validity of durational residence requirement statutes limiting welfare aid for new state residents. These new statutes have been craftily drafted in the hope that they will be able to circumvent the fatal strict scrutiny review utilized in *Shapiro*,³²¹ and are aimed at the heart of the vagueness in the right to travel analysis: When is a durational residence requirement a penalty on the right to travel? Although the right to travel has had a long and confusing history,³²² and

318. See *supra* notes 283-97 and accompanying text.

319. See *supra* parts IV.C.1-3.

320. See *supra* part IV.C.3.

321. See *supra* note 159.

322. See *supra* part II.A.

although the penalty analysis introduced by *Shapiro* for testing durational residence requirements remains undefined,³²³ the new durational residence requirements are unconstitutional for several reasons.

First, to the extent that these requirements are based on a desire to fence out indigent individuals, the new durational residence requirements must be unconstitutional regardless of the level of scrutiny applied to them.³²⁴ One thread that has clearly run through the otherwise unclear history of the right to travel analysis is the impermissibility of deterring migration of individuals, indigent or not.³²⁵ To uphold a statute based on this goal alone would require the abandonment of years of precedent.

Second, though aimed at avoiding strict scrutiny, the new breed of durational residence requirements should fail to do so. The proper test for the application of strict scrutiny is the penalty analysis introduced in *Shapiro*,³²⁶ expanded in *Memorial Hospital*,³²⁷ and restated in *Soto-Lopez*.³²⁸ Although there is no fundamental right to receive welfare payments,³²⁹ conditioning receipt of such aid on the length of an individual's residence in a particular state is a penalty on the right to travel.³³⁰ The fact that welfare aid is critical to indigent individuals means that any discrimination that reduces benefit levels—even marginally—is a severe deprivation that constitutes a penalty.³³¹ Thus, the new batch of residence requirements—regardless of type—should be subject to strict scrutiny. And when strict scrutiny is applied, these statutes must fail for lack of a compelling state interest.³³² That result is truly well-settled.

Third, even if strict scrutiny is not applied, the factual assumptions forming the foundation of these statutes are so weak that they should crumble even under rational basis review.³³³ The welfare magnet theory is misleading,³³⁴ and the alleged goal of promoting employment is easily unmasked.³³⁵ In fact, the more states try to avoid strict scrutiny by re-

323. See *supra* parts II.B-C.

324. See *supra* part III.A.

325. *Shapiro*, 394 U.S. at 631; see *supra* notes 51-52 and accompanying text; *supra* part II.

326. See *supra* part II.B.

327. See *supra* part II.C.3.

328. See *supra* part II.C.6.

329. *Dandridge v. Williams*, 397 U.S. 471, 484 n.16 (1969); see *supra* part II.C.

330. See *supra* part IV.B for an analysis of whether the various types of state durational residence requirements trigger strict scrutiny and how they fare under strict scrutiny, once triggered.

331. See *supra* notes 213, 229-31 and accompanying text.

332. See *supra* part IV.B.

333. See *supra* part IV.C.

334. See *supra* part III.A.

335. See *supra* part IV.C.2; *supra* notes 305-07 and accompanying text.

ducing the deprivation of their statutes, the more they reveal their true motive—the desire to keep indigent individuals out of the state—and the less rationally related they are to any proffered governmental interests. This desire to exclude indigents, though persistent throughout history, has been held clearly unconstitutional and should spell doom for the newly arisen durational residence requirements.

States may seek to conserve resources by reducing welfare benefits to all recipients, or to some on a rational, nondiscriminatory basis,³³⁶ but durational residence requirements are not such a basis. Durational residence requirements, though facially appealing, cannot survive in the welfare context.

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336. See, e.g., *Green v. Anderson*, 811 F. Supp. 516, 523 (E.D. Cal. 1993) (listing possible state alternatives to durational residence requirements).

* This Comment is dedicated to my parents, Allen and Gisela, and my brother, David. I would like to thank Professor Christopher May of Loyola Law School for his inspiration and guidance, the editors and staff of the *Loyola of Los Angeles Law Review* for their sound advice and meticulous work, my family for everything, and my old roommate Gretchen Helfrich who now knows more than any nonlaw student—and arguably more than any law student—ever needs to know about the right to travel.

